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## THESIS

**FROM NUREMBERG TO THE HAGUE:  
A CONTRASTING STUDY OF  
WAR CRIMES TRIBUNALS**

by

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March 1998

Thesis Advisor:

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A CONTRASTING STUDY OF  
WAR CRIMES TRIBUNALS**

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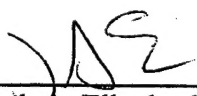
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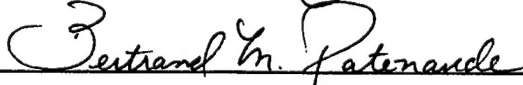
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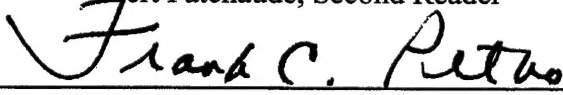
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## ABSTRACT

On May 25, 1993 the United Nations established a war crimes tribunal at The Hague for the former Yugoslavia — the first such institution since Nuremberg. As the Hague Tribunal gathers evidence and hears cases, every aspect of its establishment, structure, and mode of operation is being compared to the Nuremberg International Military Tribunal (IMT). Many people expect that the principles used to convict the accused at Nuremberg will be just as successfully applied at the Hague Tribunal. However, the cases differ in two important ways.

The first difference concerns the factors that drove the establishment of the two events. The motives behind the creation of the IMT tribunal were largely political, while in the former Yugoslavia, though a limited political agenda exists, legal considerations have been paramount.

The second difference concerns the framework of applicable law. Nuremberg defendants were prosecuted in an *ex-post facto* manner whereas at the Hague Tribunal, due to codification of war crimes laws since the IMT, the prosecution is required to produce definitive evidence in order to gain conviction.

Despite such differences, the Hague Tribunal proceedings are building on the Nuremberg precedent. Just as Nuremberg formed a milestone in the fusing of international law with fundamental moral principles, the Hague Tribunal will likely take this process a step further with the establishment of a permanent international criminal court, thereby creating some measure of deterrence for war crimes in the future.



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## I. INTRODUCTION

Kill a man, and you are an assassin. Kill millions of men, and you are a conqueror. Kill everyone, and you are a god.

Jean Rostand (1939)

You cannot qualify war in harsher terms than I will. War is cruelty, and you cannot refine it.

William Tecumseh Sherman (1864)

All too often the world has tended to view wars only in terms of causes and effects. With little attention to legal and moral ramifications, many have classified conflicts in terms of the winners and the losers. Lost is the unwarranted destruction that wars brought the innocent; what mattered most, above all else, was victory.<sup>1</sup> Until contemporary history not only were the rights of a sovereign nation to go to war, *jus ad bellum*, rarely questioned, but the constraints on the conduct of war, *jus in bello*, were largely ignored. Committing crimes during war was rarely recognized as unlawful. Nevertheless, there have been exceptions. In the Book of Joshua, soldiers during biblical times were executed for transgressing certain implicit rules of warfare, like looting conquered cities. Additional constraints attached to the conduct of war, though limited, were largely shaped by the Christian ethic as defined by the Catholic Church of the Middle Ages and the Renaissance. The Church established principles that still hold true today. War must be waged by a legitimate authority and for a just cause -- for example,

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<sup>1</sup> Norman E. Tutorow, *War Crimes, War Criminals, and War Crimes Trials* (New York: Greenwood Publishing Group, 1986), 3; See also Henry Kissinger, *Diplomacy* (New York: Simon & Schuster, 1994), 245.

to make reparations for an injury or to restore what had been wrongly seized. There had to be reasonable prospect for victory, and every attempt to resolve the matter by peaceful means must have been exhausted.<sup>2</sup> The Age of Enlightenment gave rise to the idea that while armies might clash, innocent civilians should not be harmed. Napoleon adopted codes prohibiting the execution of prisoners of war and the wanton destruction of civilian property. The Union Army adopted a code of conduct during the Civil War. The Union tried and executed the commandant of the Confederate prison camp at Andersonville for war crimes. The Declaration of St. Petersburg (1868) was signed by the major European powers to prevent the unnecessary suffering of civilians during war.<sup>3</sup> Influenced heavily by the works of the Dutch scholar and statesman Hugo Grotius (1583-1645), who founded international law in the seventeenth century and was appalled by the carnage of the Thirty Years' War, the first comprehensive codification of the international law of war was accomplished by the First Hague Convention for the Pacific Settlement of International Disputes (1899) and the Hague Convention (IV) on the Laws and Customs of War (1907).<sup>4</sup>

Though such a thing as the unlawful conduct of warfare was recognized by many nations, laws were poorly codified and applied in a discriminatory manner. Countries rarely prosecuted for fear of escalating hostilities. Therefore, following the end of hostilities, it was customary for an amnesty to be extended to all combatants accused of

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<sup>2</sup> Michael Howard, George J. Andreopoulos, and Mark R. Shulman, eds., *The Laws of War: Constraints on Warfare in the Western World* (New Haven, CT: Yale University Press, 1994), 2-4.

<sup>3</sup> This agreement regulated only small projectiles and applied to only the seventeen signatory states.

<sup>4</sup> Margaret M. Lee, "Bosnia War Crimes: The International Criminal Tribunal for the Former Yugoslavia and U.S. Policy," *Congressional Research Service Report for Congress*, 96-404F (1996): 40; Tutorow, *War Crimes, War Criminals and War Crimes Trials*, 3.

war crimes.<sup>5</sup> However, as warfare increased in destructiveness with the industrial revolution,<sup>6</sup> it became apparent that responsibility for the conduct of war between states be more clearly established.<sup>7</sup> As it happened, two world wars had to occur before any significant measures were adopted.

Chapter I of this study discusses the evolution of the law of war and provides the framework that seeks to relativize the notion that absolute parallels can be drawn between the International Military Tribunal at Nuremberg (IMT) and the International War Crimes Tribunal for the former Yugoslavia (Hague Tribunal).<sup>8</sup> Chapter II explores the history of the IMT and the formation of the Hague Tribunal. This background is essential in order to appreciate the settings and circumstances accompanying the formation of each tribunal. Chapter III examines the principles set forth at Nuremberg and how they have been integrated into present-day international criminal law. Chapter IV explains why the Hague Tribunal cannot be another IMT, chiefly because of two outstanding differences between them: the first concerns the factors that drove their implementation. The motives for the creation of Nuremberg were derived from great power politics. The victors of World War II –the United States, Great Britain, the Soviet Union, and France – established an “international tribunal” without consulting other states. Furthermore, at Nuremberg, precedents established by both positive and natural law were often ignored

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<sup>5</sup> Matthew Lippman, “Nuremberg: Forty-Five Years Later,” *Connecticut Journal of International Law*, Volume 7:1 (fall 1991): 2-3.

<sup>6</sup> Modern military technologies such as trench warfare, machine guns, and chemical weapons shattered old ideas about the “honor” of battle.

<sup>7</sup> During the twentieth century, four times as many civilians have been the victims of war crimes and crimes against humanity than the number of soldiers killed in all conflicts combined. See Michael P. Scharf, *Balkan Justice* (Durham, NC: Carolina Academic Press, 1997), xiii and Rudi J. Rummel, *Death by Government* (New Brunswick, NJ: Transactions Publishers, 1994), 9.

<sup>8</sup> Officially “The International Tribunal for the Prosecution of Persons Responsible for Serious Violations

by the victors. These motives are not present at the Hague Tribunal. Though a limited political agenda exists, it is overshadowed by a highly detailed legal approach. The second difference concerns the framework of applicable law. Nuremberg defendants were prosecuted in an *ex-post facto* manner, meaning that many of the laws used to convict the Nazi leaders had not yet been formulated. This differs from the current tribunal, where, due to the codification of war crimes laws, the prosecution is required to produce definitive evidence in order to gain conviction.

Finally, Chapter V speculates about the future. Though differences exist, the Hague Tribunal proceedings are building on the Nuremberg precedent. Just as Nuremberg was a milestone in the union of international law with fundamental moral principles, the Hague Tribunal will likely take this process one step further with the establishment of a permanent international criminal court.

## **A. BACKGROUND**

The international community, beginning with large-scale Axis atrocities in World War II and reinforced most recently by genocidal practices in the former Yugoslavia, which resulted in the rape, torture and/or death of tens of thousands and displacement of hundreds of thousands,<sup>9</sup> has been moving from no recognizable differentiation between just and unjust, or legal and illegal wars and towards enforcing international law for offenses committed during wartime. This trend has culminated in the demand for international ad hoc tribunals to try those accused of war crimes in the former Yugoslavia

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of International Humanitarian Law Committed in the Territory of the Former Yugoslavia.”

<sup>9</sup> There is no reliable estimate on how many died, but refugee debriefs suggest tens of thousands with a high end estimate of two million. The evidence is mostly anecdotal and not the result of formal investigations or exhumations, since most deaths claimed took place in areas under Serb control to which



and Rwanda.

Though this trend has led to the unprecedented establishment of a United Nations ad hoc tribunal sitting in judgment of the accused, there is nothing new, of course, in prosecuting offenders against the laws and customs of war as reflected in national military codes. For centuries military commanders, from Henry V<sup>th</sup> of England, under his famous ordinances of war in 1419, to the American military prosecution of soldiers involved in the My Lai massacre (1968-9) under the United States Code of Military Justice, have enforced such laws against violators.<sup>10</sup> However, the first modern attempt to put into practice the idea of assigning international criminal responsibility to persons guilty of crimes against humanity emerges at the end of World War I.<sup>11</sup> The Treaty of Versailles provided for an ad hoc tribunal<sup>12</sup> in Leipzig (1921) to try the Sovereign, Kaiser Wilhelm II, for war crimes. President Woodrow Wilson, however, felt that any war crimes trial would do irreparable harm to the proposed League of Nations and to the fragile Weimar Republic. The result was that the Treaty of Versailles indicted the Kaiser not for war crimes but for "a supreme offense against international morality and the sanctity of treaties."<sup>13</sup> These charges had so little basis in international law that the

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access to outsiders was/is denied. Approximately 2,000,000 people have been displaced.

<sup>10</sup> Theodor Meron, "The Case for War Crimes Trials in Yugoslavia," *Foreign Affairs*, Volume 72:3, (summer 1993): 122-123.

<sup>11</sup> The earliest recorded international tribunal dates back to the 1474 trial of the Burundian Governor of Breisach, Peter von Hagenback, whose troops had raped and killed innocent civilians and pillaged their property during the occupation of Breisach. Hagenback was found guilty of "crimes against the law of God and humanity" before a court made up of twenty-eight judges from states of the Holy Roman Empire. See Virginia Morris and Michael P. Scharf, *An Insiders Guide to the International Criminal Tribunal for the Former Yugoslavia*, Volume I (Irvington-on-Hudson, NY: Transnational Publishers, 1995). Perhaps the most famous ad-hoc tribunal was the 1810 Congress of Aix-la-Chapelle which tried and convicted Napoleon Bonaparte for waging unjust wars, sentencing him to exile on Elba.

<sup>12</sup> The 1919 Commission on the Responsibilities of Authors of the War and Enforcement of Penalties for Violations of the Laws and Customs of War.

<sup>13</sup> Treaty of Versailles, June 28, 1919, article 227.

Dutch, who had custody of the Kaiser after he fled to the Netherlands, refused to turn him over for trial on the grounds that the crimes were essentially a political offense, since it was within the prerogatives of a head of state to decide to go to war. The Treaty of Sèvres, establishing the terms of peace with the Ottoman Empire at the end of World War I, provided for the surrender by Turkey of persons accused of crimes "against the laws of humanity" in the genocidal massacre of nearly 800,000 Armenians.<sup>14</sup> In 1937, the League of Nations, of which the United States was not a member, ratified the "Convention Against Terrorism," which had a protocol providing for the establishment of a special international criminal court to prosecute crimes of terrorism.<sup>15</sup> Though the world recognized the need to assign culpability to war criminals, the lack of an international commitment up until Nuremberg prevented these and other treaties and conventions from achieving any measurable success.

## **B. THE YUGOSLAV DILEMMA**

The regime of Serbian President Slobodan Milosevic, in its vicious campaign to conquer Muslim and Croatian territory in order to create a "Greater Serbia," was willing to "countenance the most brutal behavior by man against man in Europe since Hitler's attempt to exterminate the Jews."<sup>16</sup> The atrocities that occurred in the 1990s were not an

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<sup>14</sup> Prior to the outbreak of World War I, a group of military officers took power in Turkey aligning themselves with Germany. During the course of the war, they drove Armenians into resettlement camps, raped their women, placed the men in labor camps, while expelling others into the desert, where they died of starvation and exposure. After the war, a Turkish military court convicted only two officials, hanging one. But no international trials were ever held — genocide was not yet considered an international crime — and the Treaty of Lausanne (1923) granted amnesty to the killers as the part of the price of the division of the Ottoman Empire. See Tina Rosenberg, "Tipping the Scales of Justice," *World Policy Journal*, Volume 12:3, (fall 1995): 57.

<sup>15</sup> This Convention was, ironically, adopted in response to nationalistic acts of terrorism in the Balkans. See Lee, "Bosnia War Crimes," 40-41.

<sup>16</sup> Francis Boyle, *The Bosnian People Charge Genocide: Proceedings at the International Court of Justice*

isolated episode, or the result of only recent events. Though ethnic conflict has occurred in the Balkan region for hundreds of years, it is important to note that the violence that took place fifty years earlier, during World War II, contributed greatly to the recent conflict.

In April 1941, Nazi Germany invaded Yugoslavia, creating a puppet state called the Independent State of Croatia.<sup>17</sup> Croatian Nationalists, known as the Ustashi, under the direction of the Nazis initiated a violent campaign to rid Yugoslavia of all persons of Serbian origin and create a homogenous nation of Croats.<sup>18</sup> With the defeat of Nazi Germany, the Croatian Army was forced to surrender and Yugoslavia came under the rule of Josip Tito. Despite being a half-Croat, half-Slovenian, he considered himself above all a communist who envisioned that national and ethnic rivalries, like class distinctions, would eventually fade from everyone's collective memory. Under his firm leadership, the Federated People's Republic of Yugoslavia enjoyed a relatively long period of unification and peace. After his death in 1980, he was replaced by a collective leadership that failed to provide a unifying force needed to maintain the Republic.<sup>19</sup> It was thus easy, in the depressed economic climate of Yugoslavia in the late 1980s, for leaders like Slobodan Milosevic of Serbia and Franjo Tudjman of Croatia to reopen the wounds of not only World War II, but of previous centuries.

Not since the end of World War II and the revelation of the horrors of Nazi

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*Concerning Bosnia v. Serbia on the Prevention and Punishment of the Crime of Genocide* (Amherst, MA: Aletheia Press, 1996), foreword.

<sup>17</sup> See Charles L. Nier III, "The Yugoslavian Civil War: An Analysis of the Applicability of the Laws of War Governing Non-International Armed Conflicts in the Modern World," *Dickinson Journal of International Law*, Volume 10:2 (winter 1992): 303-308.

<sup>18</sup> As a result of this ethnic cleansing, an estimated 750,000 persons were murdered.

<sup>19</sup> Nier, "The Yugoslavian Civil War," 309.

Germany has Europe confronted evidence of genocide.<sup>20</sup> As a result, amidst the reports of war crimes and atrocities committed by all participants,<sup>21</sup> but most notably by Serbs,<sup>22</sup> the United Nations Security Council on May 25, 1993, established the Hague Tribunal — the first such body since those at Nuremberg and Tokyo.<sup>23</sup> Spurred by this, both government and private organizations compiled detailed documentary and eyewitness evidence of at least 5,000 specific cases, along with lists of over 3,500 named individuals, extending to the upper echelons of the political and military establishments, allegedly responsible for committing the crimes.<sup>24</sup> In response to the deliberate, systematic, and flagrant violations of the human rights and humanitarian norms, Western opinion became the driving impetus for not only the creation, but the sustainment, of the Hague Tribunal, in the hope that the justice handed down to those responsible for the war crimes and genocidal practices in the former Yugoslavia would mirror both the process and decisions reached at Nuremberg.

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<sup>20</sup> Francis Boyle, *The Bosnian People Charge Genocide: Proceedings at the International Court of Justice Concerning Bosnia v. Serbia on the Prevention and Punishment of the Crime of Genocide* (Amherst, MA: Aletheia Press, 1996), 4.

<sup>21</sup> Evidence has revealed torture, summary executions, internment in concentration camps reminiscent of Nazi Germany, systematic mass rape and forced prostitution, inhuman treatment of prisoners and civilians, and destruction or confiscation of private property, especially Muslim mosques, not justified by military necessity.

<sup>22</sup> Although the media has vilified the Serbs, the Croats have also committed substantial war crimes. Croat extremists in Bosnia-Herzegovina carried out a brutal ethnic cleansing campaign against the Muslims during their 1993-94 war in a drive to create an ethnically pure Croat state that could be united with Croatia. There are also reports of war crimes committed by Muslims, albeit far fewer than those committed by the other two groups.

<sup>23</sup> For background on the Tokyo war crimes trials, see Arnold Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (New York: William Morrow & Co, 1988); John R. Pritchard and Sonia Magbanua Zaide, *The Tokyo War Crimes Trial: Index and Guide* (New York: Garland Publications, 1987); Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial* (Princeton, New Jersey: Princeton University Press, 1971) and B.V.A. Roling and Antonio Cassese, ed., *The Tokyo Trial and Beyond: Reflections of a Peacemaker* (Oxford, England: Blackwell Publications, 1995).

<sup>24</sup> James O. Jackson, "No Rush to Judgment," *Time*, 27 June 1994, 48.

### C. A DUBIOUS ASSUMPTION

*The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating that civilization cannot tolerate their being ignored because it cannot survive their being repeated.*<sup>25</sup>

The preceding quote by United States Supreme Court Justice and Nuremberg Prosecutor Robert H. Jackson could have very well opened the proceedings to the Hague Tribunal in the former Yugoslavia instead of Nuremberg in 1945. With our penchant for the commemoration of past events, especially such milestones as fiftieth anniversaries (as was the case of the Nuremberg trials when the Hague Tribunal moved from an administrative to a judicial process), it is hardly surprising comparisons are being made between the hearings before The Hague and those at Nuremberg. A second, though no less important reason, that simple comparisons are being drawn between the two tribunals stems from the universal abhorrence of genocide. The Holocaust was a planned attempt by Hitler and the Nazis to exterminate European Jews and eradicate every vestige of their culture. The mass media has made it easy to identify the systematic killing of Jews, Poles and others in World War II to the policies of ethnic cleansing by the Serbs.<sup>26</sup> Though the scale of atrocities committed in World War II Germany differ significantly from the massacre of Croats and Muslims in the former Yugoslavia genocide, no matter the scale, it is still genocide. Therefore popular opinion is quick to relate these two tragic events. As a result, those making these comparisons expect the same justice that was successful at Nuremberg to prevail at The Hague.

In essence then, as the Hague Tribunal gathers evidence and hears cases, every

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<sup>25</sup> Telford Taylor, *The Anatomy of the Nuremberg Trials* (New York: Little, Brown and Company, 1992), 167.

aspect of its establishment, structure, and mode of operation will have comparisons to the precedents established over fifty years ago in Nuremberg.<sup>27</sup> Expectations are that the principles used for the conviction of defendants at Nuremberg will be just as applicable to those currently awaiting trial at The Hague. The authors of the accords hope that the Hague Tribunal will be the first step in a long process to help defuse ethnic tensions and assist in the peacemaking process by bringing to justice those responsible for the most heinous acts — just as the Nuremberg trials did for Europe. As a result, many policy makers, members of the press, and human rights groups cannot help but make comparisons between the two tribunals.<sup>28</sup> Are the similarities as genuine as they appear? Did both tribunals confront similar challenges? Or did the creation of each tribunal give rise to unique problems? How much of a substantive legal, political, and moral basis does the Nuremberg experience provide for the Hague Tribunal?

This thesis contrasts the Hague Tribunal with the IMT and seeks to dispel the notion that the same legal, political, and moral principles that were applied to the Nazi leaders and organizations for determination of guilt can be applied to the war criminals in the former Yugoslavia. In addition, it considers what precedents, if any, the decisions reached by the Hague Tribunal may set with regard to the establishment of a permanent international criminal court.<sup>29</sup>

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<sup>26</sup> Michael Berenbaum, ed., *A Mosaic of Victims: Non-Jews Persecuted and Murdered by the Nazis* (New York: New York University Press, 1990), xi.

<sup>27</sup> Jeremy Colwill, "From Nuremberg to Bosnia and Beyond: War Crimes Trials in the Modern Era," *Social Justice*, Volume 22:3 (fall 1995): 112.

<sup>28</sup> For a comprehensive overview of potential pitfalls when making historical comparisons, see Ernest R. May and Richard E. Neustradt, *Thinking in Time: The Uses of History for Decision Makers* (New York: Free Pr., 1988). Mays and Neustradt analyze political disasters and successes of recent decades to provide lessons on how to use history to improve decision-making.

<sup>29</sup> A permanent international criminal court would not replace the existing International Court of Justice

## **D. THE NUREMBERG IMT AND THE HAGUE TRIBUNAL: THE PRINCIPAL DIFFERENCES**

Simple comparisons can be dangerous. The events that led to the creations and internationally recognized legitimacies of the Nuremberg IMT and the Hague Tribunal are markedly different.

### **1. Basis of Creation**

The first difference between the two tribunals concerns the factors that drove their establishment. The IMT arose in the aftermath of a horrific and all-encompassing global war in which both the Allies and Axis committed atrocities, but after which only the vanquished were prosecuted. The motives for the creation of Nuremberg were mainly the result of a politically driven process controlled by the United States which insisted that “we [the Allies] will declare what international law is....”<sup>30</sup> Charges of a politically driven process are supported by the exclusivity of those participating in the IMT’s formation, the disregard for existing international positive law and principles and the failure to seek the endorsement of the wider international community with a multilateral treaty.<sup>31</sup> These shortcomings served to strengthen the hands of those castigating the proceedings as “political” or “show” trials.<sup>32</sup> These charges are not the case with the prosecution of war criminals in the former Yugoslavia. Though a political agenda

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(ICJ), but instead complement it. Currently the ICJ, the long-standing judicial arm of the U.N., adjudicates only cases arising between states. A permanent criminal court would have jurisdiction over the offenses of individuals.

<sup>30</sup> Robert H. Jackson, “Report of Robert H. Jackson United States Representative to the International Conference on Military Trials,” Minutes of the Conference Session, July 29, 1945,” *State Department Publication 3080* (1949), 97, 99.

<sup>31</sup> Legal standards (as evidenced in the lack of an appeals process, trials held in absentia, and the defendants’ limited access to prosecutory evidence) were, at best, a secondary consideration.

<sup>32</sup> Colwill, “From Nuremberg to Bosnia,” 113, 115.

arguably does exist (focused not so much on the actual trials as on the outcome of the Hague Tribunal being used to create a permanent international criminal court), it is overshadowed by a highly refined legal approach. Because of the Hague Tribunal's required adherence to (and respect for) the norms of customary international law, the standards for the determination of culpability and the finding of guilt for the accused are vastly much higher than at Nuremberg. As a result, the likelihood that the proceedings will be politically influenced by an organization outside of the United Nations are remote.

## **2. Framework of Applicable Law**

The second major difference between Nuremberg IMT and the Hague Tribunal concerns the framework of applicable law, or "victor's justice," as some commentators have called it. Unlike the prosecution of Nazi war criminals, the application of international law to the former Yugoslavia does not involve a vanquished nation or the administration of justice by an occupying power.<sup>33</sup> The war in the former Yugoslavia ended not by force leading to surrender, but through diplomacy resulting in a negotiated and nominally agreed upon settlement at Dayton.<sup>34</sup>

The presumption that "victor's justice" may be intrinsically biased and illegitimate is best expressed in the maxim *nullem crime sine lege, nulla poena sine lege* – that is, there can be no crime and subsequently no punishment without a pre-existing law. In other words, defendants should not be prosecuted in an *ex-post facto* manner on

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<sup>33</sup> Kevin R. Chaney, "Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials," *Dickinson Journal of Comparative International Law* (fall 1995): 58.

<sup>34</sup> Cedric Thornberry, "Saving the War Crimes Tribunal," *Foreign Policy* (fall 1996): 74.



the basis of retrospective legislation, which is precisely what occurred at Nuremberg.<sup>35</sup> Was “launching an aggressive war” and the commission of “crimes against humanity” actually criminal activity punishable under international law, or merely “sonorous phrases used by the victors to cloak their purging of Nazi Germany?”<sup>36</sup> If international law lacked codification and legitimacy, under what law, then, could the German leaders be prosecuted?<sup>37</sup>

International prohibitions on waging aggressive wars and crimes against humanity had not yet been invented or, as in the cases of the Covenant of the League of Nations of 1919 and Kellogg-Briand Pact (Pact of Paris) of 1928,<sup>38</sup> the laws were so ambiguous that an extremely liberal interpretation would have been required for the indictment and prosecution of war criminals. Undaunted by the lack of any significant positive law or precedents, the Nuremberg Tribunal chose to “invent” the laws and guidelines that were required to prosecute the accused, thereby ensuring “victor’s justice.”

Conviction of the Nazis as practitioners of genocide under the charge of “crimes against humanity” proved somewhat less difficult. Questions confronting the framers of the IMT arose whether “crimes against humanity” under article VI(c) of the Nuremberg Charter<sup>39</sup> existed under a combination of sources of international law, namely

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<sup>35</sup> Colwill, “From Nuremberg to Bosnia,” 129.

<sup>36</sup> Bradley F. Smith, *Reaching Judgment at Nuremberg* (New York: Basic Books Inc., 1977), xiv.

<sup>37</sup> Some legal scholars would argue that the German leaders could have been prosecuted under the 1907 Hague Conventions. They represented the beginning of the international legal recognition of war crimes/crimes against humanity. Arguably, the most important was Hague Convention IV, Respecting the Laws and Customs of War on Land, which codified the principles of war and established an international normative core for the Nuremberg trials.

<sup>38</sup> The Allies had to be careful not to be accused of *tu quoque* evidence (meaning “if I am guilty, so are you”). They proceeded with trepidation with regards to Kellogg-Briand as the Soviet Union could be accused of aggression with the invasion of Finland, Poland, and the Baltics or Great Britain for its planned invasion of Norway.

<sup>39</sup> <http://deoxy.org/wc/wc-nurem.htm>.

conventions, custom, and general principles of law. The conclusion was that since "crimes against humanity" had not been part of treaty law, the Allies "subscribed to a liberal interpretation of the principles of legality in hopes of avoiding the criticism of enacting *ex post facto* legislation."<sup>40</sup> In addition, the "overwhelming and damning evidence of the Nazis' vast scale of racial and religious persecution eliminated concern about *ex post facto* claims."<sup>41</sup> Codifications in positive law since Nuremberg make similar questions mute for at The Hague. Nonetheless, challenges to convict on charges of genocide confront the Hague Tribunal. Documentation recovered at the end of World War II provided clear evidence that genocide was systematically coordinated and approved at all levels of the German government. The 1948 Genocide Convention requires that in order for genocide to exist, it must be organized or approved by the government. This has the potential to pose problems in the former Yugoslavia where the lack of documentation and hard evidence may make it difficult to prove government

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<sup>40</sup> Though the application of *ex post facto* justice at Nuremberg has been acknowledged by many legal scholars concerning charges of Germany waging an "aggressive war", similar accusations are nearly impossible to level against the "crimes against humanity" charge. The rationale for "crimes against humanity" was predicated on a theory of jurisdictional extension of the "war crimes" charge. The reasoning was that war crimes applied to certain protected persons, namely civilians, during war between states, and "crimes against humanity" merely extended the same "war crimes" proscriptions to the same category of protected persons within a particular state, provided it is linked to the initiation and conduct of "war crimes." As a result of this interpretation, the IMT, in an attempt to avoid any potential criticism of retroactive justice, did not recognize "crimes against humanity" committed before 1939. See M. Cherif Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court," *Harvard Human Rights Journal* (spring 1997): 26. See also "Formulation of the Nuremberg Principles," 1950 U.N.Y.B., 852-857; Bernard D. Meltzer, "'War Crimes': The Nuremberg Trial and the Tribunal for the Former Yugoslavia," *Valparaiso University Law Review*, Volume 30:3 (summer 1996): 900-901 and Office of United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression Opinion and Judgment*, (Government Printing Office, 1947): 84.

<sup>41</sup> "From Nuremberg to Bosnia: Consistent Application of International Law," *Cleveland State Law Review*, Volume 42:705 (1994): 716. The closest argument that could be remotely considered application of retroactive legislation involved the defense of Nazi labor leader Fritz Sauckel whose lawyer, Dr. Robert Servatius, claimed that the IMT Charter did not clearly define certain crimes. See Taylor, *The Anatomy of the Nuremberg Trials*, 428-29, 485.

complicity in genocide.

## E. THE HAGUE TRIBUNAL'S LEGAL FOUNDATION

In his commentary on the statute approved by the United Nations Security Council for the creation of the Hague Tribunal, Secretary-General Boutros Boutros-Ghali emphasized that the principle *nullem crime sine lege* requires that "the international (Hague) Tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all states to specific conventions does not arise."<sup>42</sup> That "part of conventional international humanitarian law which has beyond doubt become part of international customary law"<sup>43</sup> is embodied in the codification of laws not only as the result of the Nuremberg Principles, but also the 1948 Genocide Convention,<sup>44</sup> the four Geneva Conventions of 1949 on the Laws of War (Article 99 of the Geneva Convention III states: "No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed."),<sup>45</sup> the 1954 Hague Convention on Cultural Property, the Additional Supplementary Protocols I and II of 1977,<sup>46</sup> and the 1984 Torture Convention,<sup>47</sup> among others.<sup>48</sup>

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<sup>42</sup> Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808, Statute of the International Tribunal, U.N. SCOR, *U.N. Document S/25704*. Reprinted in Morris and Scharf, *An Insiders Guide*, 3.

<sup>43</sup> Report of the Secretary-General, *U.N. Document S/25704*.

<sup>44</sup> Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, 78 U.N.T.S. 1021.

<sup>45</sup> Geneva Convention I: The Amelioration of the Condition of the Wounded and Sick in Armed Forces in The Field, August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention II: The Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention III: Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; and Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

<sup>46</sup> Geneva Protocol I: Addition to the Geneva Conventions of August 12, 1949, and Relating to the

However, these codifications have created a double edged sword for the Hague Tribunal. Because of the codification of war crime laws, prosecutors at The Hague are being held to higher standards than their Nuremberg counterparts by being required to produce definitive evidence in order to gain conviction. As a result, this codification and adherence to a stricter legal standard have contributed significantly to the fact that the Hague Tribunal has been slow to issue indictments, capture the accused, and bring them to trial, let alone reach judgments in a timely fashion.

#### **F. THE HAGUE TRIBUNAL AS PRECEDENT**

Though there are significant differences between the two tribunals, the Hague Tribunal may benefit from the IMT. Just as Nuremberg was a milestone that enriched international positive law with principles that had long been discussed as forming part of natural law, it is expected that the precedents established at The Hague will take human rights one step further. It can be argued that the current Tribunal is important not only for its capacity to adequately confront the events in the former Yugoslavia, but also in terms of a growing perception that its success or failure will heavily influence the world's ability to adopt measures that prevent a recurrence of these atrocities. One of the major barriers to this goal has been the conflict between state sovereignty and the jurisdiction of such a tribunal.<sup>49</sup> These concerns may abate if The Hague is successful.<sup>50</sup> If the Hague

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Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3; Geneva Protocol II: Addition to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609.

<sup>47</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Resolution 39, U.N. GAOR, 39 Session, Supplement No. 51, *U.N. Document A/39/708*, 1984.

<sup>48</sup> Theodor Meron, "War Crimes in Yugoslavia and the Development of International Law," *American Journal of International Law* (January 1994): 79.

<sup>49</sup> States naturally have been hesitant to expose their citizens (most notably their politicians and military commanders) to international prosecution for conduct undertaken in the name of the state. This is explored

Tribunal is perceived as functioning fairly, then a case for establishing a permanent international war crimes court will be strengthened.

## G. THE IMPORTANCE OF THE QUESTION

What value, both in a political and legal framework and for the military intelligence community, is gained by the comparison of the International Military Tribunal at Nuremberg with the Hague Tribunal? First, despite the agreements reached at Dayton (1995), involvement in the Balkans may well continue to dominate both United States and Western European political and military decision making for the foreseeable future because of the violent and destructive acts that have been perpetrated since the late 1980s. The legal decisions reached by the Hague Tribunal will have consequences for such policies. Furthermore, the reaffirmation of the principles of accountability established at Nuremberg might well go a long way toward deterring those involved in the "next Yugoslavia" from committing crimes against humanity. As for the intelligence community, it is important to recognize the danger of drawing parallels. All too often the intelligence community conveniently places issues inside "boxes" that can be neatly "stacked together" to build explanations to support the intended analysis. This thesis will demonstrate the dangers of making such convenient associations. If simple comparisons are drawn between the two tribunals, dangerous expectations of applying the same criteria for guilt at The Hague as at Nuremberg may lead not only to disappointment in the West with the perceived ineffectiveness of the tribunal, but more importantly to a situation

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by Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (New York: New York Times Company, 1970).

<sup>50</sup> Roger S. Clark and Madeleine Sann, eds., *The Prosecution of International Crimes: A Study of the International Tribunal for the former Yugoslavia* (London: Transaction Publications, 1996), 164.

where the aggrieved parties in the former Yugoslavia become dubious of seeing justice done through the tribunal — leading to a renewal of conflict outside the courtroom. As this leads to a general breakdown of the Dayton Accords, the ramifications for the United States, the key power for stability in the region, are potentially enormous.

## II. THE ESTABLISHMENT OF THE TRIBUNALS

When blood is spilled, it is the responsibility of those who spill it, and the responsibility of those who could have stopped its spilling.

Weston Kosova (1994)<sup>51</sup>

The only thing necessary for the triumph of evil is for good men to do nothing.

Edmund Burke (1770)

### A. THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG

Nazi ideology promoted the ideal of war to restore German greatness in Europe. The Nazi credo also depicted the world as made up of racial heroes and villains, the latter considered to be *untermenschen* (subhumans).<sup>52</sup> Millions of innocent civilians, including Jews, Gypsies, and homosexuals, were systematically murdered by the Nazis.<sup>53</sup> Prisoners of war and civilian populations were tortured and murdered at will. Innocent civilians were subjected to the Nazis' infamous medical experiments conducted specifically to inflict the utmost pain and suffering.<sup>54</sup> Entire populations were deported to provide slave labor under the most horrible conditions for German industry.<sup>55</sup> The list of war crimes and crimes against humanity is virtually endless. Undoubtedly, the majority of these crimes arose from the Nazi conception of "total war," according to which everything, from rules and regulations to assurances and treaties, became subordinate to the dictates

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<sup>51</sup> Ed., *The New Republic*, 28 February 1994, 1.

<sup>52</sup> Taylor, *The Anatomy of the Nuremberg Trials*, 21.

<sup>53</sup> Robert E. Conot, *Justice at Nuremberg*, (New York: Carroll and Graf, 1984), 37-38.

<sup>54</sup> Conot, *Justice at Nuremberg*, 286-296.

of a racial war of conquest.<sup>56</sup> Wilhelm Keitel, Chief of the High Command of the Armed Forces, proclaimed that, "This is...[a] matter of life and death. This struggle has nothing to do...with soldierly chivalry or the regulations of the Geneva Convention."<sup>57</sup>

By late 1942, the Allies could not help but become aware of these systematic acts of cruelty and barbarism and understand that they would be confronted with numerous options on how to confront these atrocities when hostilities came to a close. They could conclude the war with a handshake, as the great powers of the nineteenth century often did, thereby re-establishing a balance of power in Europe by exacting no penalty from Germany.<sup>58</sup> Or they could rely on the Germans to prosecute those accused of war crimes, although the experience with this following World War I proved disappointing.<sup>59</sup> Finally, the Allies could summarily execute, without benefit of trial, the Nazi leadership and organizations that had perpetrated the greatest atrocities.

The victors instead chose to place Nazi leaders on trial before the world and to allow German wartime policies and conduct to be tried by an international tribunal.<sup>60</sup> As a result, on October 20, 1943, the United Nations War Crime Commission (UNWCC)

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<sup>55</sup> Taylor, *The Anatomy of the Nuremberg Trials*, 427-431.

<sup>56</sup> "From Nuremberg to Bosnia: Consistent Application of International Law," *Cleveland State Law Review*, Volume 42:705 (1994): 708.

<sup>57</sup> Matthew Lippman, "War Crimes: American Prosecutors of Nazi Military Officers," *Touro International Law Review*, Volume 6:1 (1995): 280.

<sup>58</sup> For a concise history of international relationships in the modern era, see Gordon A. Craig and Alexander L. George, *Force and Statecraft*, 3rd edition (New York: Oxford University Press, 1995).

<sup>59</sup> The results of war crime trials after World War I made this option the most unlikely. Following World War I, the Allies' plan to prosecute German war criminals by an international tribunal was abandoned in the interests of preserving the stability of the politically precarious Weimar Republic. Germany agreed to conduct a limited number of trials before the Penal Senate of the Reichsgericht. However, they showed little enthusiasm for prosecuting their own combatants. Of the 896 Germans accused of war crimes by the victors, only 12 were indicted. Three defendants never appeared and three were acquitted, while the remainder received trivial sentences. See James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (Westport, CT: Greenwood Publication Group, 1982).

<sup>60</sup> Chaney, "Pitfalls and Imperatives," 62.



was established in London. Its purpose was to formulate principles of international law and plan for the creation of a postwar international tribunal. Its primary task was to collect, investigate, and record evidence of war crimes and report all instances in which a *prime facie* case existed.<sup>61</sup> As it turned out, political considerations, namely the U.S. refusal to relinquish control over the proceedings, reduced the UNWCC to a collector of information, rather than an investigative body.

To strengthen further resolve and show unity amongst the Allies, on October 30, 1943, President Franklin Roosevelt, Prime Minister Winston Churchill, and Soviet Premier Joseph Stalin signed the Moscow Declaration.<sup>62</sup> This declaration stated that, upon cessation of conflict, the Allies would prosecute the Nazi war criminals for their aggression and wartime conduct. The Moscow Declaration, however, failed to set forth any procedures or guiding principles for the prosecution of these criminals. Specifically, there was no one common design for their judgment and punishment. Consequently, the decisions by the Allies to convene an international tribunal evolved before finally resulting in the IMT. This dilemma prompted several proposed solutions. Stalin, half-jokingly, suggested the liquidation of 50,000 Nazis.<sup>63</sup> Frustrated after World War I in their effort to have the Kaiser tried for war crimes, the British, leery of another proposal for an international tribunal, advocated the summary execution of the major war criminals

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<sup>61</sup> Tutorow, *War Crimes, War Criminals and War Crime Trials*, 4.

<sup>62</sup> See Harold Stein, ed., *American Civil-Military Decisions: A Book of Case Studies* (Birmingham, Alabama: University of Alabama Press, 1963) and Richard A. Falk, Gabriel Kolko and Robert J. Lifton, eds., *Crimes of War: A Legal, Political-Documetary, and Psychological Inquiry into the Responsibility of Leaders, Citizens, and Soldiers for Criminal Acts in Wars* (New York: Random House, 1971), 73-75.

<sup>63</sup> Stalin had allegedly compiled a list of 50,000 Nazi war criminals. Following a banquet attended by Roosevelt and Churchill at the Tehran Conference, he proposed a toast, stating, "I drink to the quickest possible justice for all German war criminals. I drink to the justice of a firing squad." When Churchill objected, Stalin again raised his glass and proclaimed, "Fifty thousand must be shot." See Taylor, *The*

with judicial proceedings for lesser ones.<sup>64</sup>

The United States initially proposed the Morgenthau Plan, a draconian measure which envisioned the destruction of German industry. Supporters of the Morgenthau plan intended to penalize the civilian population for their collective guilt, along with the whole-sale arrest of members of such groups as the Schutz Staffel (S.S.) and the Sturm Abteilung (S.A.), as well as the summary execution of the major war criminals. Ultimately, the Allies settled upon a course of action proposed by the United States Secretary of War, Henry Stimson. Under Stimson's plan, all alleged Nazi war criminals would be brought to trial before an international tribunal.<sup>65</sup>

The plan had several objectives. First, judicial proceedings might avert future hostilities which were likely to result from the execution, absent a trial, of alleged offenders. The United States argued that an execution-style judgment would be a crass political act that could quite possibly transform the Nazis into martyrs and thereby provide a platform for those intent on revitalizing national socialism.<sup>66</sup> Second, legal proceedings would bring German policies and conduct to the attention of all the world. Third, the trial, with worldwide dissemination, would legitimize Allied conduct during and after the war. Fourth, a trial, it was hoped, would advance and legitimize international law. An international trial "would provide an historical record, would help develop international standards of legal conduct, and would serve as a deterrent to future leaders contemplating similar actions."<sup>67</sup> Finally, and most important, judicial

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*Anatomy of the Nuremberg Trials*, 30.

<sup>64</sup> Taylor, *The Anatomy of the Nuremberg Trials*, 29.

<sup>65</sup> Chaney, "Pitfalls and Imperatives," 62.

<sup>66</sup> Lippman, "Nuremberg: Forty-Five Years Later," 21.

<sup>67</sup> Jackson, *State Department Publication 3080*, 42-54.

proceedings would permit the Allied powers, and the world, to punish the Nazi leadership rather than Germany's civilian population.<sup>68</sup>

By the summer of 1945, with the Allied powers' disagreements over punishment reconciled, representatives of the United States, the Soviet Union, France, and Great Britain met in London to formulate the principles under which a trial of the major Nazi war criminals would be conducted. On August 8, ignoring the legitimacy that would have been gained by submitting the proposal for ratification as an international treaty, the four victors signed the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers.<sup>69</sup> More commonly referred to as the "London Agreement," it consisted of two parts: the agreement itself and the Charter of the International Military Tribunal.<sup>70</sup> Drawn principally from the Hague and Geneva Conventions and the laudable, but unrealistic, Kellogg-Brian Pact<sup>71</sup>, the agreement advocated establishing an international military tribunal for the trial of war criminals whose offenses had no specific geographical location or strict timeframe, while the Charter, which was annexed to the agreement, set out the constitution, jurisdiction, and functions of the envisioned tribunal.<sup>72</sup>

The Allies, again refusing to make the tribunal truly international, insisted that the membership to IMT be limited to themselves and be comprised of four members and four

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<sup>68</sup> Chaney, "Pitfalls and Imperatives," 62.

<sup>69</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, August 8, 1945, 59 Statute 1544, 82 U.N.T.S.

<sup>70</sup> Charter of the International Military Tribunal, August 8, 1945, 59 Statute 1546, 82 U.N.T.S.; *Trial of the Major War Criminals before the International Military Tribunal*, Volume 1 (Washington DC: U.S. Government Printing Office, 1947-49), 8-16.

<sup>71</sup> <http://www.yale.edu/lawweb/avalon/imt/kbpact.htm>.

<sup>72</sup> Mark A. Bland, "An Analysis of the United Nations International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia: Parallels, Problems and Prospects," Indiana University School of

alternate members (one each from each nation). Decisions were made by majority vote, conviction requiring at least three affirmative votes, and the Tribunal was to be in session for one year. Article VI of the IMT Charter specified three categories of crimes for which the accused Nazis would be tried:<sup>73</sup>

- **Crimes Against Peace** (Article VIa) - planning, initiating, and waging wars of aggression, or in violation of international treaties, agreements, or assurances or the participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- **War Crimes** (Article VIb) - namely, violations of the laws or customs of war. Violations shall include, but are not limited to, murder, ill-treatment, or deportation to slave labor, or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, and wanton destruction of cities, towns, or villages not justified by military necessity;<sup>74</sup>
- **Crimes Against Humanity** (Article VIc) - namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

In addition to enumerating the categories of crimes for which the accused Nazi leaders would be tried, the Allies specified in the Charter that the principal leaders of a state were not exempt from prosecution; that “Befehl ist Befehl,” (orders are orders) or obedience to superior orders, would not be a viable excuse, though in extenuating

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Law Doctoral Thesis, 1995, 2.

<sup>73</sup> <http://deoxy.org/wc/wc-nurem.htm>.

<sup>74</sup> This count was more clearly rooted in precedent than the other two. International laws of war had developed during the 18th and 19th centuries. The Hague Conventions of 1899 and 1907 dealt with the conduct of war by outlawing certain types of weapons (dum-dum bullets, poison gas) and outlining the proper treatment of POWs/civilians. The Geneva Conventions of 1864 and 1906 dealt with treatment of the sick and wounded (after 1929, the treatment of POWs was promulgated by the Geneva Convention.). Naval law developed separately and originally dealt with problems of piracy, rescue, false flags, and the like.

circumstances it might mitigate a sentence; that accomplices were responsible for all acts performed by any person in the course of a common plan or conspiracy to commit a specific crime; and that the IMT had the authority to declare that a group or organization to which an accused belonged was a criminal organization.<sup>75</sup> Further, the IMT was required to state the basis for its findings of guilt and innocence, and was accorded the right to impose any punishment it deemed just, including execution. The seat of the IMT was established at Berlin, but Nuremberg was chosen as the place of trial for practical reasons (because of the availability of the bomb-damaged German Palace of Justice and its adjoining prison) as well as symbolic reasons (it was at Nuremberg that the Nazis staged annual mass demonstrations and decreed the anti-Semitic "Nuremberg Laws" in 1935).<sup>76</sup> The first day of trial was November 20, 1945.

The list of the accused was to some extent arbitrary, as the defendants represented the major branches of the Third Reich and included prisoners held by each of the four prosecuting nations.<sup>77</sup> Attention, driven by political rather than legal motives, was generally paid to how well known each was and how much power they had wielded rather than the availability of evidence against them. The trial of the twenty-two major war criminals was carried out over 284 days, and on October 1, 1946 the verdicts were

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<sup>75</sup> Lippman, "Nuremberg: Forty-Five Years Later," 26.

<sup>76</sup> Taylor, *The Anatomy of the Nuremberg Trials*, 64.

<sup>77</sup> The twenty-two major defendants were Karl Doenitz, Supreme Commander of the Navy; Hans Frank, Governor-General of Poland; Wilhelm Frick, Minister of the Interior; Hans Fritzsche, Ministerial Director; Walther Funk, Reichsbank President; Hermann Goering, Reichsmarschall; Rudolf Hess, Deputy to Hitler; Alfred Jodl, Chief of Army Ops; Ernst Kaltenbrunner, Chief of Reich Main Security Office; Wilhelm Keitel, High Command COS; Erich Raeder, Grand Admiral of the Navy; Alfred Rosenberg, Minister of the Occupied Eastern Territories; Fritz Sauckel, Labor leader; Hjalmar Schacht, Minister of Economics; Arthur Seyss-Inquart, Commissar of the Netherlands; Albert Speer, Minister of Armaments and War Production; Julius Streicher, Editor of *Der Stürmer* and Director of the Central Committee for the Defense against Jewish Atrocity and Boycott Propaganda; Constantin von Neurath, Protector of Bohemia and Moravia, Franz von Papen; former Chancellor; Joachim von Ribbentrop, Minister of Foreign Affairs; Baldur von

delivered. Three men were acquitted, four received prison terms not exceeding twenty years, two were sentenced to life in prison, and thirteen were sentenced to death. Four Nazi organizations were declared criminal.<sup>78</sup> Many lesser war criminals were tried over the next three years by military tribunals within the respective zones of occupation. Additionally, many non-German collaborators were tried for treason by their own governments.<sup>79</sup>

Though often criticized as a show trial that disregarded positive and natural law, the IMT at Nuremberg in 1945-46 was nonetheless a milestone event in the development of international law.<sup>80</sup> The trials were the first successful international attempt to indict and convict the perpetrators of crimes cruel and inhuman to a degree not previously known to humanity.<sup>81</sup> Nuremberg, especially in its condemnation of aggressive war, focused not only on the offenses of these defendants but also on establishing a precedent

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Schirach, Reich Youth leader.

<sup>78</sup> Die Schutz Staffel (S.S.), Der Sicherheitsdienst (S.D.), Die Geheimstaatspolizei (Gestapo), and the Leadership Corp of the Nazi Party.

<sup>79</sup> Chaney, "Pitfalls and Imperatives," 65.

<sup>80</sup> Telford Taylor is the first to argue that the trials at Nuremberg were deeply flawed. In his 1992 book, *The Anatomy of the Nuremberg Trials*, he details the political maneuvering among the Allies with wildly different ideas about how to treat the Nazis. Furthermore, the various legal doctrines were applied exclusively to the acts of the vanquished. Others who criticize the IMT as politically driven include the notable international criminal law professor Michael P. Scharf, who agrees with Taylor's criticism concerning the fact that the Nazis were the only ones called to account for violations of international humanitarian law. Scharf further argues that the Nazis were prosecuted and punished for crimes expressly defined for the first time in an instrument adopted by the victors at the conclusion of the war. See Michael P. Scharf, "Have We Really Learned the Lessons of Nuremberg?" *Military Law Review*, Volume 145, (1995): 66-67. André Gros, a French Representative to the IMT objected that the crimes proposed during the IMT drafting conference had no basis in international law or custom. See Lippman, "Nuremberg: Forty-Five Years Later." Finally, German legal scholars have published perhaps the harshest and broadest criticisms of the Nuremberg Trials, denouncing the proceedings as "a tool of Allied foreign policy and American occupational policy" whose real purpose was to "morally uplift and re-educate the German people" in line with western political ideals. See Chaney, "Pitfalls and Imperatives," 73-74.

<sup>81</sup> "From Nuremberg to Bosnia: Consistent Application of International Law," *Cleveland State Law Review*, 708.

designed to punish and deter aggression in the future.<sup>82</sup> The charter and subsequent judgment left an indelible mark on the law of war, especially with respect to the notion of individual responsibility for the violation of accepted international law. It infused positive law with the fundamental moral principles of natural law and thereby contributed to the modern international law of human rights. The reality of international life today, however, seems to make a mockery of these principles, as events in the former Yugoslavia seemed to have defied the IMT judgment and the Nuremberg principles.<sup>83</sup>

## **B. THE INTERNATIONAL WAR CRIMES TRIBUNAL FOR THE FORMER YUGOSLAVIA**

The complicated intermingling of the various ethno-religious communities in the former Yugoslavia, especially in Bosnia-Herzegovina, is the primary reason that the Balkans are arguably Europe's most unstable region. "However, ethnic atrocities, widely believed to be atavistic, are not just the result of ancient hatreds, but also of forces and events from more recent times. To impute the current maliciousness to antiquity alone is to mythologize it and thereby diminish its barbarity."<sup>84</sup> The destructive forces that allowed ethnic cleansing and war crimes to occur in the former Yugoslavia can be attributed to a more recent phenomenon.<sup>85</sup>

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<sup>82</sup> Bernard D. Meltzer, "'War Crimes': The Nuremberg Trial and the Tribunal for the Former Yugoslavia," *Valparaiso University Law Review*, Volume 30:3 (summer 1996): 904.

<sup>83</sup> "From Nuremberg to Bosnia: Consistent Application of International Law," *Cleveland State Law Review*, 705-706.

<sup>84</sup> Susan T. Kerns, "Ethnic Cleansing in Yugoslavia as a Twentieth Century Phenomenon," Georgia Southern University Master's Thesis, 1995, 6.

<sup>85</sup> For a comprehensive background on the history of conflict in Balkans, see Michael A. Sells, *The Bridge Betrayed: Religion and Genocide in Bosnia* (Berkeley: University of California Press, 1996); Christopher Bennett, *Yugoslavia's Bloody Collapse: Causes, Courses and Consequences* (Washington Square, New York: New York University Press, 1995); Noel Malcolm, *Bosnia: A Short History* (Washington Square, New York: New York University Press, 1996) and Thomas Cushman and Stjepan G. Meštrović, eds., *This Time We Knew: Western Response to Genocide in Bosnia* (New York: New York University Press, 1996).

Tito, the storied hero of the anti-Nazi resistance who held Yugoslavia in balance for nearly two generations, died in 1980. The "collective presidency" that he designed to hold all regions and ethnic groups together after his death fell apart in 1989; and after that, the demagogues exploited the situation to their own ends.<sup>86</sup> The driving force that did greater harm than all others in destroying this balance of communities was Serbian leader Slobodan Milosevic, who advocated a "Greater Serbia," which he pursued by taking more power for himself and more territory for Serbia. Milosevic was directly responsible for the propaganda that transformed many Serbs into killers.<sup>87</sup>

The Yugoslav destruction erupted in the summer of 1991, when Croatia and Slovenia declared independence without offering concrete guarantees for the security of the 500,000 Serbs within their borders. The declaration led to a sporadic civil war in Croatia between the majority Croats and the Serbs, who, despite being the minority, had the backing of the Serb-dominated Yugoslav Federal Army (JNA).<sup>88</sup> Lacking the experience and armaments of the Serbs, the Croatian forces suffered heavy casualties while losing nearly one-third of their territory. In January 1992, after six months of intense fighting, Croatia and Serbia agreed to the deployment of a peacekeeping force known as the United Nations Protection Force (UNPROFOR) in the area of the conflict inside Croatia. Despite this Croatian defeat and the overwhelming advantages held by the Serbs, the drive for independence in Eastern Europe, together with the political disputes between the federal Yugoslav government and the governments of Croatia and Slovenia,

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<sup>86</sup> Roger Cohen, "Why is the Conflict so Virulent?" *Macmillan Atlas of War and Peace: Bosnia-Herzegovina* (1996): 10.

<sup>87</sup> Anthony Lewis, "War Crimes," *The New Republic*, 20 March 1995, 31.

<sup>88</sup> The JNA, at the time, was the third largest standing army in all of Europe. See Nier III, "The Yugoslavian Civil War," 303, 310.



encouraged the Republic of Bosnia-Herzegovina in its separatist aspirations. The Yugoslav Federal Army, fearful of losing additional territory to breakaway republics, especially the crucial air base facilities and arms production centers in Bosnia-Herzegovina, increased its support to the Bosnian Serbs, who began to take a hard-line approach in their negotiations with secession-minded groups in Bosnia-Herzegovina. Nonetheless, on October 15, 1991, the Republic of Bosnia-Herzegovina proclaimed its sovereignty and initiated the process to secede from what remained of Yugoslavia.<sup>89</sup>

Pressure on the Bosnian government immediately began to mount from all sides. The European Community required that the Bosnians hold an independence referendum before it would recognize Bosnia as a sovereign state. The Bosnian Serbs, knowing they had the support of the Yugoslav Federal Army, were ready to resort to violence to prevent the succession. Serbia, for its part, instituted an economic blockade of Bosnia-Herzegovina in an effort to coerce the region to remain in the now Serb-dominated Yugoslavia. Undeterred, the Bosnian government proceeded with the independence referendum on March 1, 1992.<sup>90</sup> Predictably, Pan-Serbian nationalists loyal to Serbian Democratic Party leader Radovan Karadzic boycotted the referendum, and former Yugoslav National Army units that had organized themselves into a Bosnian Serb armed militia declared their support for Karadzic. The near consensus of voters in favor of independence was, therefore, not representative of Bosnia at large. Nonetheless, the sovereign state of the Republic of Bosnia-Herzegovina proclaimed its independence on

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<sup>89</sup> Zoran Paji, "The Conflict in Bosnia-Herzegovina, in Violation of Fundamental Rights in the Former Yugoslavia," *The David Davies Memorial Institute of International Studies Occasional Paper No. 2*, (February 1993): 3.

<sup>90</sup> Ibid.

March 6, 1992. Bosnia-Herzegovina was formally recognized as a sovereign state by the European Community on April 6, and by the United States one day later. As a direct result of these acts of political recognition, Serbian attacks against the fledgling republic intensified, and on April 7 the Serbs announced the creation of the "Serbian Republic of Bosnia-Herzegovina," a separatist entity within the newly-formed Bosnian state. Assisted by 45,000 JNA troops, the Bosnian Serb militias, under the leadership of their self-styled president Radovan Karadzic, forced hundreds of thousands of non-Serb civilians from their homes and committed tens of thousands of acts of murder, rape and torture as part of a systematic policy of "ethnic cleansing." Serbian policy was aimed at creating an ethnically "pure" Serbian state, comprising two-thirds of Bosnia-Herzegovina, which would then be united with Serbia and Montenegro and with the recently carved out ethnically-cleansed region in Croatia to form a "Greater Serbia." This prompted the first outside response to the Serbian abuse of human rights, with the U.S. State Department condemning the Serbs for ethnic cleansing.<sup>91</sup>

By mid-1992, following the shelling of the major Muslim population centers of Sarajevo, Mostar, Bihac, Tuzla, and Goradze by JNA and Serb insurgent forces, the situation in Bosnia had deteriorated to such a degree that, on July 29, the Ambassador and Permanent Representative of Bosnia and Herzegovina, Muhamed Sacirbey, sent a letter to the Security Council requesting intervention.<sup>92</sup> Shortly thereafter the Security Council passed the United States-sponsored Resolution 771, which called upon states and international humanitarian organizations to make available to the Council any

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<sup>91</sup> See Marc Weller, "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia," *American Journal of International Law*, (July 1992).

substantiated information in their possession relating to the commission of human rights violations in the former Yugoslavia.<sup>93</sup> In the end, aside from some of the parties involved in the conflict, only the United States submitted a report.

The United Nations Commission on Human Rights decided to appoint a Special Rapporteur, Tadeusz Mazowiecki, the former Prime Minister of Poland, to investigate violations of humanitarian law in the former Yugoslavia (particularly in Bosnia-Herzegovina) and to provide a preliminary report to the Secretary-General by late August 1992.<sup>94</sup> His report reached the obvious conclusion that most of former Yugoslavia, especially Bosnia-Herzegovina, was the "scene of massive and systematic violations of human rights, as well as serious grave violations of humanitarian law," and that harassment, discrimination, torture, and violence against the Muslim population were commonplace.<sup>95</sup>

The Security Council acted again in early October 1992, adopting Resolution 780. It requested that the Secretary-General "establish, as a matter of urgency, an impartial Commission of Experts to examine and analyze the information submitted pursuant to Resolution 771...together with additional information obtained through their own investigations."<sup>96</sup> The five-member Kalshoven Commission of Experts was to provide the Secretary-General with its conclusions on the human rights situation in the former

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<sup>92</sup> Bland, "Parallels, Problems and Prospects," 4.

<sup>93</sup> Security Council Resolution 771, U.N. SCOR, 47<sup>th</sup> Session, 3106<sup>th</sup> meeting, *U.N. Document S/RES/771*, August 13, 1992.

<sup>94</sup> Bland, "Parallels, Problems and Prospects," 4.; See also Karine Lescure and Florence Trintignac, *International Justice for the Former Yugoslavia* (The Hague: Kluwer Law International, 1996).

<sup>95</sup> *U.N. Document E/CN.4/1992/S-1/9*.

<sup>96</sup> Security Council Resolution 780, U.N. SCOR, 47<sup>th</sup> Session, 3119<sup>th</sup> meeting., *U.N. Document S/RES/780*, October 6, 1992.

Yugoslavia.<sup>97</sup> Based on the findings of the Kalshoven Commission, the U.N. demanded, to no avail, that the warring parties in the former Yugoslavia refrain from violating international humanitarian law and the established customs and laws of war. As a result, the Security Council, on February 22, 1993, resolved to create an international tribunal to prosecute the offenders. Additionally, it requested that the Secretary-General formulate a proposal to carry out this resolution.<sup>98</sup> Some three months later, on May 25, 1993, after having approved the Secretary-General's report, the Security Council adopted the Statute of the International Tribunal. Unanimously approved as Security Council Resolution 827, the International Tribunal for the former Yugoslavia was established "for the sole purpose of prosecuting persons responsible for serious violations of international law committed in the territory of the former Yugoslavia."<sup>99</sup> Acting under and finding its legal basis in Chapter VII of the Charter of the United Nations,<sup>100</sup> its purpose is to prosecute those individuals responsible for serious violations of international humanitarian law committed in the former Yugoslavia since January 1, 1991. Specifically, the Hague Tribunal was created to serve five important goals: deter future violations of international criminal law; break the endless cycle of ethnic violence and retribution, thereby paving the way for reconciliation; establish a historical record of atrocities before the guilty

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<sup>97</sup> This was not the first commission set up to deal with matters related to the Balkans. The Carnegie Endowment for International Peace established a commission to investigate alleged atrocities committed against prisoners of war and civilians during the first Balkan War of 1912 and the second Balkan War of 1913. See M. Cherif Bassiouni, "Current Development: The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780," *The American Journal of International Law* (October 1994): 8.

<sup>98</sup> Security Council Resolution 808, U.N. SCOR, 48<sup>th</sup> Session., 3175<sup>th</sup> meeting., U.N. Document S/RES/808, February 22, 1993. Reprinted in Morris and Scharf, *An Insiders Guide*, 157.

<sup>99</sup> Security Council Resolution 827, U.N. SCOR, 47<sup>th</sup> Session, 3217<sup>th</sup> meeting., U.N. Document S/RES/827, May 25, 1993. Reprinted in Morris and Scharf, *An Insiders Guide*, 177.

<sup>100</sup> Chapter VII authorizes the Security Council, once it has determined the existence of a threat to the peace, breach of peace, or act of aggression, to take such measures as necessary to maintain or restore

could reinvent the truth; bring the guilty to justice in a fair manner; and serve as a model for future ad hoc tribunals or a permanent international criminal court.<sup>101</sup>

Unlike the IMT at Nuremberg, the Hague Tribunal's jurisdiction, as outlined in the Statute of the International Tribunal, encompasses not aggressive war, but serious violations of international humanitarian law. Article 1 established that the Tribunal "shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." Specifically, under Articles 2 through 5 of the statute, the Tribunal's jurisdiction encompasses:<sup>102</sup>

- **Grave Breaches of the 1949 Geneva Convention** (Article 2) — which includes the willful killing, torture or inhumane treatment, causing great suffering or serious injury to people protected by the conventions, and the extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. Grave breaches further include compelling prisoners of war or civilians to serve in the forces of a hostile power, willfully depriving a prisoner of war or a civilian of the rights to a fair and regular trial, the unlawful deportation or transfer or unlawful confinement of civilians, and the taking of civilian hostages;

- **Violations of the laws or customs of war** (Article 3) — includes the employment of weapons calculated to cause unnecessary suffering; the wanton destruction of population centers not justified by military necessity; the attack of undefended population centers; the seizure of, destruction or willful damage done to institutions of religion, charity, education, and the arts and science; historic monuments and works of art and science; and the plunder of public or private property. Hague law regulates the means and methods of warfighting in a manner that seeks to minimize unnecessary injury or suffering;

- **Genocide** (Article 4) — as derived from the 1948 Convention, genocide

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international peace and security.

<sup>101</sup> Michael P. Scharf, "The Politics of Establishing an International Criminal Court," *Duke Journal of Comparative and International Law* (fall 1995): 168.

<sup>102</sup> Scharf, *Balkan Justice*, 243-246.

is defined by the United Nations as an intentional attempt to destroy, in whole or in part, a national, ethnic, racial or religious group by killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on its members conditions of life calculated to bring about the group's physical destruction in whole or in part, imposing measures to prevent births within the group, or forcibly transferring children of the group to another group. Punishable crimes of genocide also include conspiracy to commit genocide, direct and public incitement to commit genocide, attempts to commit genocide, and complicity in genocide;

- **Crimes against humanity** (Article 5) — includes acts committed against any civilian population in times of international or internal armed conflict: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds, and other inhumane acts.

“Bosnia is not Auschwitz, and the Serbian leaders are not Hitler. The scale of war crimes in the former Yugoslavia is much smaller. But the principles are the same. A people were singled out for destruction because they were different.”<sup>103</sup> Just as Nuremberg was used by the Allies to punish those individuals responsible for genocide and launching an aggressive war and to absolve the German people of guilt, the credibility of international humanitarian law dictates that a tribunal is essential to hold accountable those who practiced ethnic cleansing in the former Yugoslavia. However, though on the surface there seem to be similarities between the two tribunals, those who expect the blanket of mass indictments and arguably foredrawn convictions of Nuremberg to be repeated at The Hague need to temper their expectations, as there are significant differences in the complex web of moral, political, and legal issues.

Though there are differences between the two tribunals, the precedents established by the IMT with the Nuremberg Principles have nonetheless been invaluable in

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<sup>103</sup> Lewis, “War Crimes,” 29.

establishing the legitimacy of the Hague Tribunal.





### III. THE INTERNATIONAL MILITARY TRIBUNAL

It is therefore fitting that we should again proclaim our determination that none who participate in these acts of savagery go unpunished.

Franklin D. Roosevelt (1944)<sup>104</sup>

The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.

Robert H. Jackson (1945)<sup>105</sup>

#### A. THE SIGNIFICANCE OF NUREMBERG

Though even its most vociferous supporters readily admitted that the International Military Tribunal had a shaky legal foundation, it nonetheless was the first, and up until the tribunals for the former Yugoslavia and Rwanda, the only international criminal tribunal in modern times. "Its charter and subsequent judgment are among the most significant developments in recent international law, but like any other novel endeavor, the Nuremberg IMT has engendered its share of criticism."<sup>106</sup>

Telford Taylor suggests that the trials were deeply flawed, but Justice Jackson stated that the Allied prosecutors were "consoled by the fact that in proceedings of this novelty, errors and mistakes may also be instructive in the future."<sup>107</sup> Despite the criticism that the demerits (victor's justice, *ex post facto* application of Allied-formulated laws, violation of the defendants' due process and rights of appeal, and the tenuous legal foundation of the Tribunal's existence and authority) raise questions as to the legal

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<sup>104</sup> Falk, Kolko and Lifton, *Crimes of War*, 77.

<sup>105</sup> Taylor, *The Anatomy of the Nuremberg Trials*, 167.

<sup>106</sup> Scharf, "Have We Really Learned the Lessons of Nuremberg?" 65.

validity and credibility of the process, the trial and subsequent minor trials definitively established that individuals rather than states are responsible for violations of international law. The Allies applied to such lawbreakers the principle of conspiracy, by which those who join in a common plan to commit war crimes are responsible for the acts of any other conspirator in executing the plan. In dismissing the plea of "acts of state" as freeing defendants from legal responsibility, the charter refused to recognize the immunity once enjoyed by criminal statesmanship. Nuremberg made clear that even the highest state official would be liable for the systematic commission of gross violations of human rights.<sup>108</sup> This return to fundamental principles of international law was a complete rejection of "the extreme positivist assertion that the state, supreme within its own sphere, sovereign and equal to other states in international law, shields its officials from international sanction by virtue of state privileges and immunities."<sup>109</sup> Moreover, the Charter ruled that the orders of a superior do not free a defendant from responsibility. Finally, the legacy of Nuremberg did not place the responsibility solely on the shoulders of the aggressor. As Chief Justice Jackson stated, "it was quite evident that the law of the Charter pierced national sovereignty and presupposed that all statesmen had a responsibility for international peace and order, as well as responsibilities to their own states."<sup>110</sup> The international community could no longer ignore atrocities committed in war and claim the status of an innocent bystander. To do so would be incriminating and make the international community at least partially responsible.

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<sup>107</sup> Jackson, *Department of State Publication 3080*, 440.

<sup>108</sup> Lyal S. Sunga, "Individual Responsibility in International Law for Serious Human Rights Violations," *International Studies in Human Rights*, Volume 21 (1992), 48.

<sup>109</sup> *Ibid.*

<sup>110</sup> Robert H. Jackson, *International Conference on Military Trials* (Washington D.C.: U.S. Government

## B. PRINCIPLES OF THE NUREMBERG INTERNATIONAL MILITARY TRIBUNAL

Though the IMT never remotely claimed to have outlawed the concept of war, the trial and conviction of the major Nazi leaders were nonetheless innovative and led to an eventual general acceptance by the international community of the human rights concept embodied in what would eventually become known as the "Nuremberg Principles." These principles, in conjunction with the post-Nuremberg codification of war crimes law, have provided some of the most important precedents, and therefore legitimacy, for the United Nation Security Council Resolutions that established the Hague Tribunal.<sup>111</sup>

The first Nuremberg Principle states that any person(s) who commits an act that constitutes a crime under international law is personally responsible for the act and is therefore liable to punishment.<sup>112</sup> The fundamental rule is that "international law may impose duties on individuals directly without interposition of internal law."<sup>113</sup>

The second Nuremberg Principle declared that "the fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law."<sup>114</sup>

An individual who has committed an international crime that is punishable under international law is liable for his act, regardless of the provisions of internal law. This principle is credited with having established the "supremacy" of international law over

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Printing Office, 1945), ix.

<sup>111</sup> See footnotes 44-47 for location of these documents.

<sup>112</sup> Whitney R. Harris, "A Call for an International War Crimes Court: Learning from Nuremberg," *University of Toledo Law Review*, Volume 23:2 (winter 1992): 248-249.

<sup>113</sup> Bland, "Parallels, Problems and Prospects," 5; "International Law Commission Resolution on the Formulation of the Nuremberg Principles," 1950, *United Nations Document A/CN.4/22/1950*, reprinted in M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (Zoetermeer, The Netherlands: Martinus Nijhoff, 1992), 222.

national law.

The IMT also established the accountability of individuals for crimes committed by them acting as heads of state or as responsible government officials. Under Principle III, the fact that a person acted in this capacity while committing a gross violation of human rights does not relieve him of international responsibility. The Tribunal explicitly rejected the concept that because wars are fought by states, they alone must answer for their consequences, and instead held that leaders who plan and wage aggressive wars or direct others to commit crimes must answer personally for their actions.<sup>115</sup>

Principle IV stated that “the fact that a person acted pursuant to an order of his Government or of a superior does not free him from responsibility under international law, provided a moral choice was in fact possible.” The existence of a superior’s orders is not a defense.

Principle V addressed the issue of fairness and impartiality during a trial conducted for gross violations of international humanitarian law. Individuals charged with war crimes should not be dealt with summarily, but rather should have a fair trial, during which they are presumed innocent until evidence establishes guilt beyond a reasonable doubt. This principle lessens the likelihood that petty revenge will supplant justice, or in the case of the war criminals in Germany and the former Yugoslavia, turn them into martyrs and thereby provide a grounds for reviving the very acts the international community hoped to stop.

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<sup>114</sup> Bassiouni, *Crimes Against Humanity in International Criminal Law*, 222.

<sup>115</sup> Harris, “A Call for an International War Crimes Court,” 249.

Principle VI set forth that the following are punishable under international law:<sup>116</sup>

• **Crimes Against Peace:**

- Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
- Participation in a common plan or conspiracy or the accomplishment of any of the aforementioned.

Though not incorporated into the Hague Tribunal, this category of crime would have been applicable to Serbian and Croatian leaders who started the war and to the Bosnian Serb military commanders or political leaders who prolonged the conflict;

• **War Crimes:** Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

This would undoubtedly be applicable to the atrocities committed in detention camps throughout the former Yugoslavia and to the general human rights violations and destruction of cities and religious shrines not justified by military necessity.

• **Crimes Against Humanity:** Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

This has direct applicability to the former Yugoslavia where ethnic cleansing and mass rape in Bosnia reached epidemic proportions. Proof of systematic governmental planning of the atrocities is required; however, the character and evident systematic nature of many of the crimes in Bosnia more than attest to the obvious Bosnian Serb and

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<sup>116</sup> <http://deoxy.org/wc/wc-nurem.htm>.

Serbian governmental roles.

Finally, Principle VII stated that complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principles VI is a crime under international law.

### **C. THE IMPACT OF THE NUREMBERG IMT TODAY**

The Nuremberg Principles have had a profound impact on international criminal jurisprudence. Not only have the principles established by Nuremberg been incorporated into many domestic legal systems,<sup>117</sup> they have also influenced the Charter of the United Nations and the meaning and legal status of many of the norms found in the 1948 Genocide Convention, the 1949 Geneva Conventions, the 1977 Additional Protocols I and II, and the 1984 United Nations Convention Against Torture. The norms apparent in these and other multilateral human rights treaties adopted since Nuremberg are evidence that the majority of nations, including the former Socialist Federal Republic of Yugoslavia (SFRY),<sup>118</sup> recognize the significance of the Nuremberg Principles in contemporary international law.<sup>119</sup>

The consensus today is that the Nuremberg Principles, while not setting a formal precedent<sup>120</sup> in international law, are nonetheless an integral component and that

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<sup>117</sup> Sunga, "Individual Responsibility in International Law," 49.

<sup>118</sup> The SFRY is a signatory to the 1948 Genocide Convention, the 1949 Geneva Conventions on the Laws of War and Additional Protocols I and II, the 1954 Hague Convention on Cultural Property, the 1966 Covenant on Civil and Political Rights, the 1984 Torture Convention and the 1989 Convention on the Rights of the Child. Treaty law binds the nationals of a signatory state. Furthermore, under generally accepted principles of international law, new states/entities which emerged from the former Yugoslavia remain bound to observe Yugoslavia's multilateral treaty commitments. This obligation will persist until a new government expresses a formal and otherwise permissible claim to the contrary.

<sup>119</sup> Bland, "Parallels, Problems and Prospects," 5-6.

<sup>120</sup> As Sunga suggests, a true precedent has binding force upon later adjudications of a similar nature. However, the IMT was not a permanent court and no other international court with permanent criminal

individual responsibility for war crimes has become widely accepted as an international legal norm, despite the lack of a permanent judicial body to enforce it.<sup>121</sup> The Nuremberg Principles, in conjunction with international positive law codifications and Security Council Resolutions addressing the situation in Bosnia-Herzegovina, provide a sufficient legal basis to indict, arrest, and prosecute individuals in the former Yugoslavia who have committed or sanctioned barbaric acts in direct violation of international human rights law and the laws and customs of war.

Though the Hague Tribunal relies much more heavily on a legal foundation, it has been dogged by obstacles that were absent at Nuremberg. For example, the codification of international laws since Nuremberg is, ironically, making it considerably more difficult to convict those war criminals currently being held at The Hague. Because of The Hague's required adherence and respect for the norms of customary international law, the criteria for determination of culpability and the subsequent finding of guilt for the accused are much more rigid than those applied at Nuremberg. In addition, physical evidence and eyewitness testimony are scarce; the ability to apprehend violators is doubtful, as the mandate of IFOR (Implementation Force)/SFOR (Stabilization Force) makes soldiers reluctant to seize suspects or guard war crime sites; and the Tribunal's effectiveness is undermined by the lack of funding, resources, and world interest. Regardless, The Hague represents an excellent opportunity, and the first since Nuremberg, to vindicate international humanitarian law by prosecuting those responsible for committing war crimes. Its moral and legal grounds, backed by principles established

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jurisdiction over individuals has been created since Nuremberg. Thus, the judgment of the IMT cannot constitute a truly binding and authoritative precedent in international law.

at Nuremberg, enables the Hague Tribunal to reaffirm the sanctity of basic human rights.

Though the Nuremberg proceedings have rightly been acclaimed as a significant and defining moment in terms of the development and enforcement of international and humanitarian law, they cannot be easily used as a blanket precedent for the Hague Tribunal. Admittedly, Nuremberg's strengths, as discussed above, provide for the legitimate prosecution of war criminals in Yugoslavia under universally accepted international laws and conventions. However, it is more important to recognize the deficiencies of IMT and thus its limits as a precedent for The Hague.

It is crucial that the IMT's weaknesses, as largely a politically driven process that was questionably supported by an internationally recognized framework of applicable law, are recognized by those who insist upon making the dangerous assumption that the same principles that convicted the war criminals of Nazi Germany be used to convict those in the former Yugoslavia. If simple comparisons are drawn between the two tribunals, dangerous expectations of applying the same criteria for guilt at the Hague Tribunal as at Nuremberg may lead not only to disappointment in the West with the perceived ineffectiveness of the tribunal, but more importantly to a situation where the aggrieved parties in the former Yugoslavia become dubious of seeing justice done through the tribunal — leading to a renewal of conflict outside the courtroom. As this leads to a general breakdown of the Dayton Accords, not only are the ramifications for the United States, the key power in bringing stability to this region potentially enormous, but also the Euro-Atlantic system of states and due process of law.

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<sup>121</sup> Sunga, "Individual Responsibility in International Law," 35.



#### IV. WHY THE HAGUE CANNOT BE ANOTHER NUREMBERG

That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to reason.

Robert H. Jackson (1945)<sup>122</sup>

We have an obligation to carry forward the lessons of Nuremberg. Those accused of war crimes against humanity and genocide must be brought to justice. There must be peace for justice to prevail, but there must be justice when peace prevails.

William J. Clinton (1994)

In early 1993, then United States Secretary of State Lawrence Eagleburger proclaimed that "a second Nuremberg was in store for the practitioners of ethnic cleansing," naming ten candidates, including Serbian President Slobodan Milosevic, for prosecution as war criminals.<sup>123</sup> In 1993 as well, then United States Ambassador to the United Nations Madeleine Albright, referring to Nuremberg, stated in an address to the General Assembly on the establishment of a possible tribunal to hear war crimes in the former Yugoslavia that "there is an echo in this chamber today."<sup>124</sup> Unfortunately, Eagleburger and Albright fell prey to the euphoria that enveloped the international community with the passage of U.N. Security Council resolutions establishing the Hague Tribunal. Like many others, they believed that the legal, political, and moral principles

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<sup>122</sup> Taylor, *The Anatomy of the Nuremberg Trials*, 167.

<sup>123</sup> Ronald Masland and Margaret Garrard Warner, "Will There Be 'a Second Nuremberg'?" *Newsweek*, 4 January 1993, 36. See also Morris and Scharf, *An Insiders Guide*, Volume I, 30.

<sup>124</sup> Julia Preston, "U.N. Security Council Establishes Yugoslav War Crimes Tribunal; Judicial Panel Is First

that were applied to Nazi leaders and organizations for indictment and judgment could be successfully applied to the accused war criminals from the former Yugoslavia. Comparisons between the Hague and Nuremberg tribunals became inevitable. However, proponents of the idea that the Hague Tribunal would be a second Nuremberg had to consider salient dissimilarities. Two significant differences — the basis of creation and the framework of applicable law — require examination.

#### A. BASIS OF ESTABLISHMENT

An important precept to determine the legitimacy of an international war crimes trial is whether the tribunal itself is based on globally accepted legal precedents and principles.<sup>125</sup> Although international legitimacy is not the case when individual states conduct war crime trials according to their own domestic laws (as was the case with Adolf Eichmann in Israel or, more recently, the trial of Maurice Papon in France), legitimacy becomes crucial when the proceedings are conducted on an international stage, since the legitimacy of the tribunal's creation and of the subsequent trials will only be affirmed in the world's eyes if they are grounded in the basic principles of international law.<sup>126</sup> In this respect, the IMT fell short because it failed to subscribe to legal principles acceptable to a majority of states; Nuremberg's basis was determined by the political objectives of the victors. Since it had a limited basis in the then-acceptable framework of international law and given that one of the central objectives at Nuremberg was to create new principles of international law, it is not surprising that the establishment of the IMT,

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Such Body Since Nuremberg," *The Washington Post*, 23 February 1993, A1.

<sup>125</sup> Colwill, "From Nuremberg to Bosnia," 113.

<sup>126</sup> Ibid.

as Telford Taylor himself readily admits, was the result of a political, and not legal, process.<sup>127</sup>

Fifty years of reflection by the international community has given the Hague Tribunal an opportunity to avoid these very charges. Though criticism is inevitable whenever states confront one another in the international arena, the framers of the Hague Tribunal have implemented measures to ensure that the current tribunal is grounded in legal principles that are widely-accepted legal by the international community.

### **1. Nuremberg International Military Tribunal**

From the initial pleas by the exiled leaders of German-occupied states at the 1942 London Declaration of St. James to the signing of the London Agreement in 1945, the establishment and operation of the IMT had a problematic basis in recognized international positive law. Once the decision to prosecute Nazi war criminals was made by the Allies in 1942, the process of establishing a tribunal was dominated by the United States, the USSR, France and Great Britain; all other states were excluded. Though Allied politicians claimed that the establishment of a tribunal would be an unanimously agreed upon and collaborative effort, it was in all respects a unilateral process controlled by the United States and driven by political, rather than legal, imperatives.

Within the United States political establishment there were two competing and contradictory initiatives. The Treasury Department backed the Morgenthau Plan, which claimed that all Germans were criminally responsible and the demanded total de-Nazification, demilitarization, and deindustrialization of Germany. In contrast, the War

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<sup>127</sup> Taylor, *The Anatomy of the Nuremberg Trials*, 50-51.

Department backed Stimson Plan, which argued that the atrocities committed by the Third Reich could only be corrected by the reaffirmation of principles of international legality, and that this required the establishment of an international body (restricted to only the victors) to sit in judgment.<sup>128</sup>

Once the political choice had been made by the Allies to establish a tribunal based on the proposals of the Stimson initiative, major disagreements along the way were nonetheless still not resolved by legal precedence, but rather by political fiat. For example, despite the Soviet opinion that the formation of a tribunal should be based on the drafting of an internationally agreed upon treaty — such treaties historically being the source of positive international law and the only means, therefore, of securing binding force for these decisions — public opinion and political pressure, especially in the United States, forced an entirely novel alternative procedure by means of which the tribunal would be established.<sup>129</sup> The Allies, without even attempting to gain international legitimacy by soliciting outside consultation or ratification, signed the London Agreement, which established the International Military Tribunal at Nuremberg to try Nazi war criminals, and the Nuremberg Charter, which defined the Tribunal's jurisdiction, composition, powers and procedures.

Ratification of a treaty establishing the IMT by a majority of the international community would have ensured that Nuremberg was firmly grounded in the principles of customary international law. Instead, the Allies established a Tribunal that had a questionable legal basis, which tainted its legitimacy.

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<sup>128</sup> Colwill, "From Nuremberg to Bosnia," 114. See also See Harold Stein, ed., *American Civil-Military Decisions: A Book of Case Studies* (Birmingham, Alabama: University of Alabama Press, 1963).

Essentially the product of a lengthy and complex political process dominated by the United States and restricted to Russian, British, and French approval, the legal basis of the IMT at Nuremberg has been susceptible to challenge and controversy.<sup>130</sup> In hindsight it must therefore be viewed as highly regrettable that the Allies did not establish the IMT in a manner that, at the very least, showed any respect for the norms of customary international law. The refusal even to consider a basic precept of universal acceptability by formulating a multilateral treaty, though admittedly a time-consuming process, in establishing what was after all being described as an "international" tribunal served to strengthen the hands of those castigating the proceedings as nothing more than political or show trials.<sup>131</sup>

Further charges of political maneuvering resulted from the composition of the body sitting in judgment. The IMT, composed of judges from only the "Big Four" Allied Powers, was not, as its name suggests, an international court, and as a result raised questions about the defendants' ability to be impartially judged. Further evidence that the defendants were judged as political criminals was the fact that two of the judges of the Nuremberg Tribunal, Major General I.T. Nikitchenko (Soviet Union) and Robert Falko (alternate, France), had served earlier as members of the committee that drafted the Nuremberg Charter and subsequent indictments. Having written the law to be applied and selected the defendants to be tried, they were not likely to be sufficiently impartial

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<sup>129</sup> Ibid., 115.

<sup>130</sup> Though provisions were made for other states to adhere to the agreement — and by the Nuremberg judgment date of October 1, 1946, nineteen such states had done so — they had no input in the establishment of the Charter, the framework of the International Military Tribunal, or the judicial decision making process. See Bland, "Parallels, Problems and Prospects," 3.

<sup>131</sup> Colwill, "From Nuremberg to Bosnia," 113, 115.

and unbiased judges.<sup>132</sup> The Charter also included various novel international legal doctrines that were applied exclusively to the acts of the vanquished, specifically the Nazis. All the defendants were German; no defendants from the other European Axis Powers were indicted or tried before the IMT. Furthermore, no Allied personnel were prosecuted. Had judges and prosecutors been drawn from neutral countries, acting without political constraints, charges against the Allies may have been lodged for such acts as deportation and internment of the Japanese, the fire-bombing of Dresden, the massacres of Poles at Katyn, or the failure to assist Jewish refugees.<sup>133</sup>

Beyond the actual establishment of the Tribunal, its judgments also were largely devoid of any detailed legal analysis, as the IMT devoted little attention to the guilt of individual defendants.<sup>134</sup> In most instances it is hard to argue today that guilt was not predetermined. During the drafting conference, Justice Jackson recognized that, "There could be but one decision in this case...that we are bound to concede [guilt]."<sup>135</sup> In several other instances, the determination of guilt and punishment were the product of the lobbying and biases of the governments sitting in judgment.<sup>136</sup>

Finally, an argument can be made that Nuremberg was a politically driven process when related to goals of the Western Powers concerning post-World War II security interests — specifically to help smooth America's transition to superpower status.<sup>137</sup>

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<sup>132</sup> Scharf, *Balkan Justice*, 11.

<sup>133</sup> Lippman, "Nuremberg: Forty-Five Years Later," 37.

<sup>134</sup> Those who were acquitted (Hjalmar Schacht, Franz von Papen, and Hans Fritzsche) by the IMT fared no better than those convicted, as, in the absence of double jeopardy, they were subsequently found guilty in German courts. See Lippman, "Nuremberg: Forty-Five Years Later," 39-40.

<sup>135</sup> Jackson, *Department of State Publication 3080*, 97, 115.

<sup>136</sup> For an example of these negotiations see Smith, *Reaching Judgment at Nuremberg*, 220-229.

<sup>137</sup> Smith, *Road to Nuremberg*, 252. See also Hans Ehard, "The Nuremberg Trial Against the Major War Criminals and International Law," *American Journal of International Justice*, Volume 43 (1949): 233 and

Though the Soviets sat at the same prosecutory table as the Western Allies, ideological differences between the two sides may have already started to shape the new Cold War security environment. As a result, it can be argued that in order to recruit Germany into a post-World War II alliance, Western members of the Tribunal, led by the United States, avoided actively entertaining arguments that would intentionally incite international condemnation of the entire German populace as being collectively responsible for the atrocities committed by the Nazis. Some revisionist historians agree with Bradley Smith that in an attempt to help Germany rebuild politically and economically, Western governments exerted political pressure to force their respective Tribunal members to interpret the aggressive war count narrowly and thus to limit the proceedings to a consideration of the liability of only the most senior officials in the Third Reich. In the view of the Tribunal, the average German citizen, including the common soldier, was repressed and intimidated into cooperation with the Nazi regime and therefore did not deserve prosecution. This argument is highlighted by the West's failure to bring many German industrialists to trial; only Funk, Speer, and Schacht were there as representatives of the economic establishment.<sup>138</sup> Germany would only be useful for the post-World War II Western alliance if recovery from near industrial collapse and economic destruction were reversed. The only way to accomplish this would be to overlook, or at least

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*Trial of the Major War Criminals before the International Military Tribunal*, Volume V (Nuremberg Germany, 1946-47), 370, 426. The Chief Prosecutor for the French Republic, Mr. Francois de Menthon, stated in January 1946 that one purpose of the trials was to "re-educate" and "morally uplift" the German people in order to re-integrate them "into the community of free countries...."

<sup>138</sup> Smith, *Reaching Judgment at Nuremberg*, pp. 63-64. See also Eugene Davidson, *The Trial of the Germans: An Account of the Twenty-Two Defendants Before the International Military Tribunal at Nuremberg* (Columbia MO: University of Missouri Press, 1997); Benjamin Ferencz, *Less Than Slaves* (Cambridge, MA: Harvard University Press, 1980); and John A. Appleman, *Military Tribunals and International Crime* (Westport CT: Greenwood Publication Group, 1972).

minimize, the responsibility that German industrialists, such as Gustav and Alfried von Krupp or those at I.G. Farben, had for the Third Reich.<sup>139</sup> The Western Allies, believing that they had rightfully prosecuted those most responsible, were able to welcome the newly “cleansed” West Germany as a partner in the Cold War against the Soviet Union.<sup>140</sup>

In summary then, Nuremberg was heavily driven by the political concerns of the victorious Allies, who were more preoccupied with documenting the Nazis’ conspiratorial rise to power and their aggressive attacks than bring individuals to justice. To the Americans especially, the conviction of individuals was less important than establishing incontrovertible historical proof of Nazi tyranny.<sup>141</sup> As a result, claims that the IMT had a sound legal basis are questionable.

Due to the disregard of existing positive law and the failure to seek the endorsement of the international community through a multilateral treaty, the legitimacy of the IMT has been adversely affected by this controversial political basis. The same cannot be said about the Hague Tribunal, whose legitimacy has been strengthened by the lessons learned from Nuremberg. The framers of the Hague Tribunal recognized that its legitimacy depended on an acceptance that it was rooted firmly in legality, which meant that its establishment was in accord with commonly accepted principles of international positive and natural law.

## **2. International War Crimes Tribunal for the Former Yugoslavia**

With reports of ethnic cleansing in the former Yugoslavia making front page

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<sup>139</sup> None of the major industrialists served more than five years in prison. Almost all returned to their firms’ ownership in whole or in part.

<sup>140</sup> Matthew Lippman, “The Denaturalization of Nazi War Criminals in the United States: Is Justice Being



headlines around the world by mid-1992, the Security Council of the United Nations, realizing the need to establish a legitimately recognized legal process that could not be condemned in hindsight as politically biased, decided to take four steps in succession: condemnation, publication, investigation, and, by convening an ad hoc tribunal, punishment.<sup>142</sup> Though this process was bound to be time-consuming, especially in light of the growing number of reports of atrocities in Bosnia-Herzegovina, the Security Council anticipated that these four steps would ensure legitimacy by the international community.

As a first step, the Security Council passed Resolution 764, condemning all atrocities as violations of international law. The resolution stressed "that persons who commit or order the commission of grave breaches of the 1949 Geneva Conventions are individually responsible in respect of such breaches as serious violations of international humanitarian law."<sup>143</sup>

One month later, with Security Council Resolution 771, the U.N. publicized the atrocities. "Expressing grave alarm at continuing reports of widespread violations of international humanitarian law occurring...within the territory of the former Yugoslavia," the Council called upon all states and international organizations to submit "substantiated information" in order to document and publicize the atrocities.<sup>144</sup> Resolution 771 required that the Secretary-General submit a report to the Security Council summarizing

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Served?" *Houston Journal of International Law* (1982): 169.

<sup>141</sup> Harris, "A Call for an International War Crimes Court," 240.

<sup>142</sup> James C. O'Brien, "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia," *American Journal of International Law* (October 1993): 640.

<sup>143</sup> Security Council Resolution 764, U.N. SCOR, 47<sup>th</sup> Session, 3093<sup>rd</sup> meeting, *U.N. Document S/RES/764*, July 13, 1992.

<sup>144</sup> Security Council Resolution 771.

any evidence that atrocities were being committed and recommending additional measures that might be appropriate. In addition, the Security Council, invoking its authority to take binding decisions under Chapter VII of the U.N. Charter, decided that all those concerned in the former Yugoslavia and all military forces in Bosnia-Herzegovina would be subject to the resolution, and warned that noncompliance would result in the adoption of further measures.<sup>145</sup>

International publicity and demands for immediate condemnation of ethnic cleansing in the late summer and early fall of 1992 prevented the Council from waiting for these reports. Instead, going a step further, it passed Security Council Resolution 780, an impartial Commission of Experts to investigate violations of international law. Within four months of its establishment, the Kalshoven Commission of Experts concluded that grave breaches and other violations of international humanitarian law had been committed in the former Yugoslavia. The Commission defined the relatively new term of "ethnic cleansing," in the context of the Yugoslav conflict, as "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area."<sup>146</sup> It concluded that ethnic cleansing had been carried out "by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assault, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property."<sup>147</sup> The Commission further concluded that the policy and practices of ethnic cleansing described

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<sup>145</sup> Morris and Scharf, *An Insiders Guide*, Volume I, 22-23.

<sup>146</sup> U.N. Document S/25274, 16.

above constituted crimes against humanity, could be assimilated to specific war crimes, and could also constitute the crime of genocide as defined in the Genocide Convention.<sup>148</sup>

The hope was that the findings reached by this international panel of experts would be recognized as impartial and therefore acknowledged as legitimate by a preponderance of the international community.<sup>149</sup> Most importantly, the Commission concluded, and the Security Council later concurred, that the situation in the former Yugoslavia was a "conflict of international character" and therefore subject to the international laws of armed conflict.<sup>150</sup> Furthermore, to avoid the entanglements of Nuremberg, the Commission took the view that a tribunal should not deal with claims of aggression or legitimacy of the use of force, but only with conduct in connection with the *jus in bello* and other violations of international humanitarian law.

Finally, on February 22, 1993, Security Council Resolution 808 announced the fourth step: punishment through due process of law through the creation of an international tribunal to prosecute those who had violated international humanitarian law in the former Yugoslavia. In the same resolution, the Security Council requested that the Secretary-General prepare a report "on all aspects of this matter, including specific proposals and, where appropriate, options for the effective and expeditious implementation of [this decision], taking into account suggestions put forward in this regard by member states."<sup>151</sup>

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<sup>147</sup> U.N. Document S/25274, 16.

<sup>148</sup> Morris and Scharf, *An Insiders Guide*, Volume I, 28-29.

<sup>149</sup> The Commission was initially composed of Fritz Kalshoven from the Netherlands, Torkel Opsahl from Norway, M. Cherif Bassiouni from Egypt, William Fenwick of Canada, and Keba Mbaye of Senegal.

<sup>150</sup> Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Document S/25274, February 10, 1993. 13-14, paragraph 37-45.

<sup>151</sup> Security Council Resolution 808.

The report to the Secretary-General was prepared on the basis of existing positive and natural law, taking into account the views expressed by interested states and organizations on the various legal issues relating to the Tribunal.<sup>152</sup> Established by the unanimously approved Security Council Resolution 827, the International Tribunal for the former Yugoslavia has as its sole purpose the prosecution of “persons responsible for serious violations of international law committed in the territory of the former Yugoslavia since 1991.”<sup>153</sup>

The Security Council took careful legal steps in dealing with the atrocities in the former Yugoslavia, exhausting all alternatives before implementing Chapter VII. With Nuremberg in mind at each stage, there was understandable concern that the Council not be seen by the international community as unnecessarily intruding upon state sovereignty or stepping outside the bounds of accepted international legal practices. This concern was driven home when several states and legal commentators urged the Council to consider using a consensual mechanism — either an international treaty or a General Assembly resolution — to establish the tribunal.<sup>154</sup> In the context of the situation in the former Yugoslavia, however, a treaty approach had several disadvantages, including the

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<sup>152</sup> *U.N. Document S/25704*, The report contains the following statement: “It should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to ‘legislate’ that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.” See also Morris and Scharf, *An Insiders Guide*, Volume I, 31-32.

<sup>153</sup> Security Council Resolution 827.

<sup>154</sup> O’ Brien, “The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia,” 642; See also *U.N. Document S/PV 3217*, 1993, 36-37 (verbatim transcript of Security Council deliberations on Resolution 827), remarks of Brazilian representative; Letter from the Permanent Representative of the Russian Federation to the Secretary-General, April 5, 1993, *U.N. Document S/25537*, 15; Letter from the *Charge d’affaires* a.i. of the Permanent Mission of Yugoslavia to the Secretary-General, May 19, 1993, *U.N. Document S/25801*, 1993, 3; CSCE Rapporteurs, Proposal for an International War Crimes Tribunal for the Former Yugoslavia, 1993, reprinted in *U.N. Document S/25307*; See Morris and Scharf, *An Insiders Guide*, Volume I, 363-365 for each proposing body’s method of establishment.

time required for negotiation and conclusion in a multilateral setting, the additional time required to attain the necessary ratifications for its entry into force and, in particular, the absence of any guarantee that the states concerned would become parties to the treaty.<sup>155</sup>

The Hague's proponents countered that provisions for consent outside of the narrow membership of the Security Council were purposely built into the Tribunal's statute. Specifically, the U.N. General Assembly, serving as an oversight body not present at Nuremberg, must approve the Tribunal's budget, and thus approve its mandate and, in effect, its statute. The General Assembly, not the Security Council, elects the judges (eleven, with no two judges being nationals from the same state). Unlike the Allies at Nuremberg, the members of the Security Council recognize that they are not competent to sit in judgment of alleged perpetrators, since they constitute, in essence, a political entity. Instead, the Security Council established a separate independent judicial body to apply the principles of individual criminal responsibility. Furthermore, the Hague Tribunal's authority to issue mandatory orders is limited to the transfer of indicted individuals and to other forms of judicial assistance. States retain the right to start and complete their own judicial proceedings against those who violate international humanitarian law and may follow their own domestic processes in complying with the Tribunal's orders. Perhaps most important, the Hague Tribunal, unlike the IMT, is accountable to the defendants, who are not prohibited from requesting that a judgment be appealed.<sup>156</sup>

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<sup>155</sup> Morris and Scharf, *An Insiders Guide*, Volume I, 40.

<sup>156</sup> O'Brien, "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia," 642-643; See also *U.N. Document S/25704* (May 3, 1993) reprinted in "32 International Legal Materials," *American Society of International Law*, Volume 32:4 (July 1993): 1168-1169.

Though critics have expressed serious doubt as to whether Chapter VII is broad enough for the Security Council to establish international tribunals,<sup>157</sup> the legality of the Chapter VII basis for the Hague Tribunal has been justified by reference to the exhaustion of a wide range of alternative remedies, ranging from condemnation to embargo to air strikes, attempted by NATO, the United States, and United Nations in the face of continuing atrocities in the region. Prosecution by an ad hoc tribunal was thus viewed as the only option following the failure of the previously established legal criteria of condemnation, publication, and investigation.<sup>158</sup> Finally, in a detailed report<sup>159</sup> issued May 3, 1993, Secretary-General Boutros-Ghali insisted that implementation of a tribunal through Chapter VII "would be legally justified both in terms of the object and purpose of the decision...and past Security Council practice" and "that the conflict in the region constitutes a threat to international peace and security;" that "all parties involved in said conflict are bound to comply with international humanitarian law;" and that the "establishment of a war crimes tribunal would contribute to the restoration of international peace and security by ending violations of human rights." The Statute of the International Tribunal's legal basis with regard to Chapter VII and to previous resolutions

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<sup>157</sup> Critics contend that a legal mechanism less open to scrutiny would have been to have the General Assembly approve a resolution. However, the question of a possible role for the General Assembly in the establishment of a Tribunal raises issues concerning not only the respective competences of the Security Council and the General Assembly, but also the proper balance between these two principal organs in the field of international peace and security. While the General Assembly may discuss and make recommendations on any questions relating to the maintenance of international peace and security, the Security Council has primary responsibility for maintaining international peace and security on behalf of the member states. U.N. Charter Articles 11, 12, and 24 state that if the Security Council is exercising its functions with respect to a particular dispute or situation, the General Assembly cannot make recommendations unless requested to do so by the Security Council. See Morris and Scharf, *An Insiders Guide*, Volume I, 40-41.

<sup>158</sup> Colwill, "From Nuremberg to Bosnia," 117-118.

<sup>159</sup> Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, *U.N. Document S/25704*.

thus justifies its creation by the Security Council.

## B. FRAMEWORK OF APPLICABLE LAW

The second major difference between the two tribunals concerns the framework of applicable law, or "victors' justice," as some commentators have called it. As with the political basis of establishment, the precedents of international law employed by the framers of Nuremberg fall short of providing an acceptable model for the Hague Tribunal. The authors of the Nuremberg Charter were widely perceived, at the time and more so since, as having breached fundamental principles of international legality. The success of Nuremberg was thereby tarnished by the application of *ex post facto* laws and by allegations of judicial partiality derived from "victors' justice."<sup>160</sup> Unlike the prosecution of the Nazi war criminals, the application of international law to the former Yugoslavia does not involve a vanquished nation or the administration of justice by an occupying power.<sup>161</sup> The war in the former Yugoslavia ended not by force leading to surrender, but through diplomacy resulting in a negotiated and nominally agreed upon settlement at Dayton.<sup>162</sup> As a result, there most likely will be no charges that a conquering power has used its political and military dominance to manipulate the existing international legal structure. Though this, combined with codifications of international laws and precedents established since Nuremberg, has made the challenge to the Hague Tribunal in this respect less daunting, hurdles still confront the Hague Tribunal's prosecutors, since these very codifications will make it much more difficult to indict and

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<sup>160</sup> Bland, "Parallels, Problems and Prospects," 13.

<sup>161</sup> Chaney, "Pitfalls and Imperatives," 58.

<sup>162</sup> Thornberry, "Saving the War Crimes Tribunal," 74.

convict suspected war criminals in the former Yugoslavia.

### 1. Nuremberg International Military Tribunal

“The principle of ‘victor’s justice’ is best expressed in the maxim *nullem crime sine lege, nulla poena sine lege*, the essence of which is that there can be no crime and subsequently no punishment without a pre-existing law. In other words, defendants should not be prosecuted in an *ex post facto* manner, on the basis of retrospective legislation, which is precisely what occurred at Nuremberg.”<sup>163</sup> “Was launching an aggressive war and the commission of crimes against humanity actually criminal activity punishable under international law, or merely sonorous phrases used by the victors to cloak their purging of Nazi Germany? Under what law then could prosecution occur?”<sup>164</sup> International prohibitions on waging aggressive wars and crimes against humanity were so ambiguous that an extremely liberal interpretation would have been required for the indictment and prosecution of war criminals. Undaunted by the lack of any significant law or precedents, the judges and prosecutors at Nuremberg interpreted existing law loosely or “invented” the guidelines they deemed necessary to prosecute the accused, thereby ensuring “victor’s justice.” The lack of any internationally recognized foundation in positive law severely damaged the legitimacy of Nuremberg.

Many problems were the product of negotiators being guided by their own legal conceptions and the experiences of their respective legal systems: the common law

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<sup>163</sup> Colwill, “From Nuremberg to Bosnia,” 129.

<sup>164</sup> Smith, *Reaching Judgment at Nuremberg*, xiv. The most likely would have been prosecution under the 1907 Hague Conventions. It represented the beginning of the international legal recognition of war crimes and crimes against humanity. Arguably, the most important was Hague Convention IV, Respecting the Laws and Customs of War on Land, which codified the principles of war and established an international normative core for the Nuremberg trials. See Rosenberg, “Tipping the Scales of Justice,” 57.



adversarial system as it had evolved differently in England and in the United States and variations of the civil law inquisitorial system of Russia and France.<sup>165</sup> The result was a blended system of justice that was questionable as an international legal standard and nearly impossible for those charged to defend against. Defense attorneys were thus hampered in their efforts to mount a credible defense for their clients.

The incorporation of the Anglo-American judicial concept of conspiracy or common plan was patently novel under international law. The United States insisted that the leaders, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any war crimes listed under Article VI of the Nuremberg Charter were responsible for all acts performed by any persons in execution of such plan. This charge permitted the Allied prosecutors to reach members of various Nazi organizations who otherwise would have escaped indictment. Through the charge of conspiracy, the IMT would be able to indict members of the Reich Cabinet, along with the upper strata of the S.A., S.S., S.D., Gestapo, NSDAP Leadership Corps, and the General Staff.<sup>166</sup> This could in turn be used by the occupation courts to hold low-level members of such organizations criminally liable simply on the basis of membership since their active participation would be sufficient to establish guilt.<sup>167</sup> Justice Jackson pointed out that acceptance of charges of conspiracy would permit the efficient trial and conviction of thousands of suspected war criminals.<sup>168</sup> The intent was also to convict the Nazis for atrocities that occurred before the outbreak of war — especially acts against the

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<sup>165</sup> Scharf, *Balkan Justice*, 7.

<sup>166</sup> Chaney, "Pitfalls and Imperatives," 72.

<sup>167</sup> Lippman, "Nuremberg, Forty-Five Years Later," 25. See also "Minutes of the Conference Session," July 2, 1945, reprinted in Jackson, *State Department Publication 3080*, 129, 133.

German Jews. While these acts could not be tried as war crimes *per se*, they could be punishable as initial steps in a conspiracy to commit war crimes once the war began.

French as well as Russian framers were hesitant to accept this proposal, since the Anglo-American concept of conspiracy was not recognized in any of the continental European or common law legal systems. The French and Russians, though puzzled by the concept of a common plan or conspiracy, under increasing political pressure from the United States reluctantly acquiesced, but while insisting that any charges of conspiracy be restricted only to Article VI(a), crimes against peace.

Other examples of questionable incorporation of retrospective law were the assigning of criminal responsibility to not only individuals, but to heads of states.<sup>169</sup> Nuremberg opponents have argued that heads of states act on behalf of their governments, and thus should be held accountable only to the laws of that state. They may be morally "responsible to mankind" but in previously held American views, they had no such legal responsibility.<sup>170</sup> Legally a head of state exercises sovereign rights conferred upon him by those he governs, as their leader, it is to them that he is legally responsible.<sup>171</sup> The framers of the IMT argued the opposite.

The existence of retrospective justice is also evident from the adoption of Article VI(c), crimes against humanity, that the United States radically changed its position from the one it took following World War I, "that crimes against the laws of humanity" did

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<sup>168</sup> "Minutes of the Conference Session," July 2, 1945, reprinted in Jackson, *State Department Publication* 3080, 130.

<sup>169</sup> Colwill, "From Nuremberg to Bosnia," 119.

<sup>170</sup> "Historical Survey of the Question of International Criminal Jurisdiction," *U.N. Document A/CN.4/7/Revision I*, 1949.

<sup>171</sup> Leslie S. Wexler, "The Proposed International Criminal Court: An Appraisal," *Cornell International Law Journal* (1996): 670.

not exist in positive international law.<sup>172</sup> No legal development took place between 1919 and 1945 that could have explained this change of position. Again, politics drove the law.<sup>173</sup>

The most often criticized application of *ex post facto* justice applied to the Nuremberg defendants related to the charges of waging an aggressive war. Described in Article VI(a) of the Nuremberg Charter as "crimes against peace," the aggressive war charge provides the clearest evidence that accepted legal principles were subordinated to the political interests of the Allies. Conviction under charges of waging an aggressive war or crimes against peace as specified in the Charter was especially important to the United States. Given the human misery resulting from Nazi aggressions Justice Jackson, among others, found charges of war crimes based only on how the war had been conducted insufficient.<sup>174</sup> "It was necessary also to impose individual punishment for aggressive war, the supreme evil and the generating cause of most other offenses, and their attendant agonies."<sup>175</sup>

The United States, through the Stimson Plan, identified the outlawing of aggressive war as a principal objective of the trial. Together with the United Kingdom, the United States viewed the aggressive war charge as providing the justification for expanding the Tribunal's criminal jurisdiction to encompass acts against civilians, acts

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<sup>172</sup> Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities, Annex II, April 14, 1919. Reprinted in *American Journal of International Law*, Volume 14:127 (1920): 144-151. See M. Cherif Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court," *Harvard Human Rights Journal* (spring 1997): 17, 26.

<sup>173</sup> Bassiouni, "From Versailles to Rwanda," 26.

<sup>174</sup> See Robert H. Jackson, *The Nürnberg Case* (New York: Alfred A. Knopf, 1947), 131-147 for emphasis.

<sup>175</sup> Meltzer, "'War Crimes': The Nuremberg Trial and the Tribunal for the Former Yugoslavia," 899.

which would otherwise fall within Germany's domestic jurisdiction.<sup>176</sup> The fear of American and British statesmen was that any German prosecution would mirror Germany's half-hearted and unsuccessful attempts of the trials following World War I. Therefore these crimes needed to be included under the jurisdiction of the IMT. However, this objective required a new legal framework because of the confused and uncertain state of existing international law.<sup>177</sup> As stated, international prohibitions on waging aggressive wars and crimes against humanity had not yet been invented, or as in the cases of the Covenant of the League of Nations (1919), the Locarno Pact (1925), and the Kellogg-Briand Pact (1928), were so vague that an extremely liberal interpretation would have been required.<sup>178</sup> For example, though Kellogg-Briand, which had been signed by sixty-three nations, including Germany, had "condemned recourse to war" and renounced it, and pledged that the resolution of disputes would involve only "peaceful means," it had not gone so far as to declare aggressive war a crime or spell out the penalties for its violation.

Citing Kellogg-Briand, which had renounced war as an instrument of national policy, the architects of Nuremberg, led by Secretary of War Stimson and Justice Jackson, established that if one state acts aggressively by invading another state, it must be acting unlawfully. Consequently its acts of war in the invaded country should be considered murder and assault under that country's domestic law. The drafters of the

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<sup>176</sup> Lippman, "Nuremberg: Forty-Five Years Later," 24.

<sup>177</sup> Colwill, "From Nuremberg to Bosnia," 120.

<sup>178</sup> Other prohibitions regarding aggressive war include the General Protocol of 1924 for the Pacific Settlement of International Disputes, The Eighth Assembly of the League of Nations in 1927, and the Convention for the Affirmation of Aggression. Again, these resolutions fall short of either making aggressive war an internationally recognized criminal offense or providing for enforcement and punishment.

Nuremberg Charter argued that, since the Nazis were cognizant of the fact that their actions were contrary to both existing positive and natural law as documented in agreements such as Kellogg-Briand, any attempt by the defendants to protest the imposition of *ex post facto* justice would be without merit. It is doubtful whether the states that agreed to Kellogg-Briand believed that they were, in effect, waiving the right of state defense and exposing their civilian and military leaders to criminal liability and prosecution. The Tribunal escaped this dilemma by ruling that the pact had to be interpreted in light of the dynamic nature of international law. Yet, it is difficult to discover any consistent practice supporting the Tribunal's determination that an aggressive war constituted an international crime. As one observer noted, "no performance at all would seem to indicate no custom at all."<sup>179</sup> "The argument that treaties may be interpreted in light of evolutionary developments introduces an impermissible degree of uncertainty and discretion into the interpretation of treaties, particularly when extending their language to impose criminal liability."<sup>180</sup> It can be argued that the U.S. Congress would not have ratified a treaty if they had even the remotest of idea that it would expose American political and military leaders to potential international penal liability in the event that, if America started a war, the treaty could be reasonably interpreted as giving one or a combination of European states the power to try Americans for the "crime of planning, preparing or waging a war of aggression."<sup>181</sup>

Should the United States not assume the same for Germany?

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<sup>179</sup> Dina G. McIntyre, "The Nuremberg Trial and International Law," *American Journal of International Law*, Volume 41 (1947): 20, 28.

<sup>180</sup> Lippman, "Nuremberg: Forty-Five Years Later," 44.

<sup>181</sup> This argument holds just as true today as it did in the 1920s, when Kellogg-Briand was ratified by the U.S. Senate. See McIntyre, "The Nuremberg Trial and International Law," 98-99.

Nonetheless, Jackson insisted that the principle of retroactive punishment, if properly understood, did not preclude punishment in the circumstances involved.<sup>182</sup> He cited as further evidence the fact that Adolf Hitler himself recognized the unlawfulness of waging an aggressive war. In an address to the Reichstag, Hitler indicated that the Poles had illegally launched a war of aggression and that the Nazis had only acted in self-defense.<sup>183</sup>

The logic of Jackson's arguments was again challenged by the French and the Soviets. The Soviets insisted that only a truly internationally recognized organization could decide if there was criminality involved in waging an aggressive war. In reality, Stalin was concerned that the charge of aggressive war could be applied to the USSR's carving up of Poland or its attack against Finland in 1940.<sup>184</sup>

The French, though believing that the merits of the charge were morally and politically desirable, agreed with their Russian counterparts and argued that this charge would not stand up to scrutiny in the international arena.<sup>185</sup> The French contended that while an aggressive state may agree to compensate an aggrieved state, as Germany was required to do following World War I, there were no internationally recognized laws against aggressive warfare. Furthermore, international law did not generally limit a

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<sup>182</sup> Jackson, *The Nürnberg Case*, 85.

<sup>183</sup> Though Hitler may have recognized a degree of unlawfulness in waging an aggressive war, he dismissed any real concern about accountability for acts of aggression and genocide by stating, with reference to the fact that no action was taken against Turkish officials for the large-scale killing of Armenians in Turkey in 1915, "Who after all is today speaking about the destruction of the Armenians?" Hitler's Speech to Chief Commanders and Commanding Generals, August 22, 1939, quoted in Bassiouni, *Crimes Against Humanity in International Criminal Law*.

<sup>184</sup> Russia finally accepted the inclusion of the aggressive war charge when the Allies agreed that the jurisdiction of the IMT would be limited to the European Axis war criminals. See Jackson, *State Department Publication 3080*, 330; and Taylor, *The Anatomy of the Nuremberg Trials*, 66.

<sup>185</sup> Taylor, *The Anatomy of the Nuremberg Trials*, 65-66.

state's use of force or recognize a just war doctrine.<sup>186</sup> Professor André Gros, a French Representative to the United Nations War Crimes Commission, argued that the charge had no basis in international law or custom that it was "a creation by four people who are just four individuals — defined by those four people as criminal violations of law. Those acts have been known for years before and have not been declared criminal violations of international law. It is *ex post facto* legislation."<sup>187</sup>

Despite French and Russian objections, support for the inclusion of this charge against the Nazis by President Truman and Justice Jackson, was unwavering. The Americans wanted to win the trial on the ground that the actions of the Nazis were illegal, whereas the French and the Russians merely wanted to prove that the Nazis were "bandits" who should be punished for atrocities, murders, and mass executions.<sup>188</sup> Despite the lack of any recognizable international legal precedents, the strength of the United States political will, combined with Justice Jackson's threat that the United States would unilaterally try war criminals in its custody, eventually coerced the French and Russians into concession.<sup>189</sup> As a result, crimes against peace was incorporated into Article VI(a) of the Nuremberg Charter and applied retroactively to cover the planning and waging of aggressive war by the Nazis.

The first line of defense employed by the Allies in the face of criticism of the imposition of *ex post facto* law was that because of the Germany's unconditional surrender, they had acquired sovereign legislative power over the country. Sir David

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<sup>186</sup> Minutes of the Conference Session, July 19, 1945, Jackson, *State Department Publication 3080*, 295.

<sup>187</sup> Minutes of the Conference Session, July 23, 1945, Jackson, *State Department Publication 3080*, 328, 325.

<sup>188</sup> Minutes of the Conference Session, July 25, 1945, Jackson, *State Department Publication 3080*, 376, 383-384.

Maxwell Fyfe, a Tribunal member from Great Britain, stated that, “We [the Allies] declare what international law is....[T]here won’t be any discussion on whether it is international law or not.”<sup>189</sup> The Allies implied that due to the severity and near global scope of the atrocities committed by Germany, they “did not need to trouble themselves about the state of pre-existing law.”<sup>191</sup> But the Tribunal members knew that this would not be an acceptable explanation. Its framers, recognizing the criticism of the application of *ex post facto* laws, looked to lessen accusations of the IMT being little more than “show trials” by suggesting that “The [Charter] was not an arbitrary exercise of power on the part of victorious nations, but...the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.”<sup>192</sup> In hindsight, even Telford Taylor, who has been selectively critical of the IMT, recognized that the accusation of “victor’s justice” may not necessarily have been fully justified. “The *ex post facto* problem is not a bothersome question if we keep in mind that this is a political decision to declare and apply a principle of international law.”<sup>193</sup>

However, for all the criticism directed at the application of *ex post facto* justice, with respect to the count of crimes against peace, Nuremberg focused not just on the offenses of the Third Reich, but also on establishing a precedent designed to deter and punish aggression in the future.

## **2. International War Crimes Tribunal for the Former Yugoslavia**

Though charges of aggressive warfare and crimes against peace are not an issue,

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<sup>189</sup> Ibid., 384.

<sup>190</sup> Minutes of the Conference Session, July 29, 1945, Jackson, *State Department Publication 3080*, 97, 99.

<sup>191</sup> Smith, *Reaching Judgment at Nuremberg*, 155.



the statutes of the Hague Tribunal make perfectly clear that complaints similar to Nuremberg's use of *ex post facto* legislation will not resurface.<sup>194</sup> The legitimacy of the Hague Tribunal is based on both conventional and customary law rather than the rights of belligerents to enforce the laws of war.<sup>195</sup> In his commentary on the Statute approved by the United Nations Security Council for the creation of the Hague Tribunal, Secretary-General Boutros-Ghali, reflecting on the Nuremberg criticisms, stated that the principle *nullem crime sine lege* requires that "the international Tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise." He stated further that "part of conventional international humanitarian law which has beyond doubt become part of international customary law"<sup>196</sup> is embodied in the codification of laws as the result not only of the Charter of the IMT and the subsequent Nuremberg Principles, but also of the Geneva Conventions of August 12, 1949, for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of October 18, 1907, and the Convention on the Prevention and Punishment of the Crime of Genocide of December

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<sup>192</sup> Excerpt from the Nuremberg Judgment, 1946. See Colwill, "From Nuremberg to Bosnia," 119.

<sup>193</sup> Taylor, *The Anatomy of the Nuremberg Trials*, 51.

<sup>194</sup> Crimes against peace were omitted from the Hague Tribunal, since their inclusion would almost inevitably require the Tribunal to investigate the cause of the conflict itself (and the justifications issued by the combatants), which would involve the Tribunal squarely in same type of political issues that plagued the IMT. Instead, according to paragraph 1 of Security Council Resolution 808, the Tribunal shall only prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.

<sup>195</sup> This is formally recognized in Article 99 of the Geneva Convention III, which states: "No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed."

<sup>196</sup> Report of the Secretary-General, *U.N. Document S/25704*.

9, 1948.<sup>197</sup> The legitimacy of charges against the accused in the former Yugoslavia are specifically based on the following positive law codifications:<sup>198</sup>

- **Grave Breaches of the Geneva Conventions of 1949** is perhaps the most important and is a combination of the four Geneva Conventions approved following World War II. Article I expanded the jurisdiction of international criminal law beyond acts undertaken in furtherance of a war of aggression and established that genocide, 'whether committed in time of peace or in time of war, is a crime under international law';
- **Violations of the law or customs of war** is derived from the Hague Convention of 1907, the Nuremberg Charter, and the 1977 Additional Protocols. This charge is a catchall for violating international standards of warfare, from the use of poisonous weapons to the destruction of private property or cultural institutions not justified by military necessity;
- **Genocide** is also derived from a post-World War II international treaty, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The charge of genocide encompasses a number of actions that may invite the charge, but makes the defining characteristic intent. Thus, the definition of genocide is acts committed with the intent to destroy, whole or in part, a national, ethnical, racial, or religious group;
- **Crimes against humanity**, though not yet comprehensively codified, are derived from precedents established at Nuremberg, and include the commission of several acts, such as killing, imprisonment, and torture, during armed conflict against a civilian population. The charge specifically says that the conflict can be national or international in character. This is important because many Serbs claim the war as an internal or civil war, not an international conflict. While this representation, if proven, can free a defendant of some charges (such as violations of the law or customs of war), crimes against humanity is not one of them.

While there may be other rules of customary law contained in other conventions, the above agreements provide a sufficient basis with respect to the alleged crimes. Though an unarguable internationally accepted precedent in both positive and natural law

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<sup>197</sup> See *U.N. Document S/25704*, Section II, paragraphs 31-55; Bland "Parallels, Problems and Prospects," 9-13; and Lippman, "Nuremberg: Forty-Five Years Later," 48-52 for emphasis.

<sup>198</sup> "The Tribunal and the Law," <http://www.courttv.com/casefiles/warcrimes/reports/tribunal.html>. See also Morris and Scharf, *An Insiders Guide*, Volume I, 64-68.

has been established in the wake of Nuremberg, an initial issue of primary concern, as Bland points out, was whether the international agreements signed by the SFRY were binding on the states created by its dissolution, namely Croatia, Slovenia, the Federal Republic of Yugoslavia (Serbia and Montenegro), and Bosnia-Herzegovina. The SFRY ratified the 1948 Genocide Convention, the four 1949 Geneva Conventions on the Laws of War and the Additional Protocols I and II, the 1954 Hague Convention on Cultural Property, and the 1984 Torture Convention. However, accession to treaties ratified by predecessor states is ordinarily not automatic except in relation to those treaties that involve pre-existing international boundaries. Nonetheless, it is not without precedent that all successor states are presumed to accept the international humanitarian legal obligations of their predecessor states, despite no such existing binding requirement.

More concrete support is found in a series of negotiations concluded in May 1992 as Croatia, Serbia, and all entities in Bosnia-Herzegovina agreed to be bound by the obligations of the former Yugoslavia under the four Geneva Conventions and accepted the "Statement of Principles" issued by the London Conference on Yugoslavia on August 26, 1992, "concerning compliance with international humanitarian law and personal responsibility for violations of the conventions."<sup>199</sup>

Bland argues that today the principle of individual responsibility under international humanitarian law for serious human rights violations is generally accepted, as is the list of treaty and customary provisions that defines war crimes and crimes against humanity. Punishment by the *ex post facto* application of law is thus not an issue

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<sup>199</sup> Meron, "The Case for War Crimes Trials in Yugoslavia," 129. For a more thorough elucidation, see Jordan J. Paust, "Applicability of International Criminal Laws to Events in the Former Yugoslavia," *The*

for the Hague Tribunal. However, though able to avoid the criticism of "victor's justice," the Hague Tribunal confronts challenges absent from Nuremberg.

First, despite agreed upon criteria on what constitutes breaches of international humanitarian law by all involved states, if suspects do not voluntarily turn themselves in or are not handed over by their governments, it does not matter how far beyond reproach the Hague Tribunal is to Nuremberg's *ex post facto* justice. Unlike the IMT, the Hague Tribunal is endowed with only minimal authority to punish. With no power to enforce an order to arrest suspects, those who have been indicted and fail to turn themselves in face little risk, since, in contrast to Nuremberg, there will be no trials in absentia. The Hague Tribunal is hampered by a lack of cooperation of the states involved. Although Belgrade is a party to the Dayton Accords, it has not surrendered war criminals under its *de facto* control to the Tribunal. Serbia and Montenegro explicitly refuses to extradite indicted war criminals on the grounds that it claims not to possess the necessary domestic legislation for extradition to The Hague. Croatia also refuses to cooperate and, aside from General Tihomir Blaskic's voluntary appearance at The Hague, and the recent extradition of Saso Aleksouski, none of the indictees residing in Croatia has been extradited. None of the forty-eight publicly indicted war criminals residing in Serbian territory of Bosnia-Herzegovina has been turned over to The Hague.<sup>200</sup> In fact, the Pale government has openly declared that it has no intention of cooperating with the Tribunal, yet it is subject to no international sanction. President Biljana Plavsic has frequently pointed out that the Bosnian Serb Constitution bans extradition and that her government

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*American University Journal of International Law and Policy* (winter 1994).

<sup>200</sup> See "Bringing War Criminals to Justice: Obligations, Options, Recommendations," *University of Dayton*

will not turn over Karadzic, Mladic, or any other indictees to the Hague Tribunal<sup>201</sup> and the ability to apprehend violators is doubtful as the mandate of IFOR/SFOR makes soldiers reluctant to seize suspects.

Second, what is supposed to distinguish the Hague Tribunal from the IMT is, that in theory, the former is supposed to try all defendants, not just the major political and military leaders. However, trying all accused is more difficult than was first envisioned. Identifying the defendants to be prosecuted by Nuremberg was relatively simple: those individuals indicted by the victors had been selected from the top leadership of the Nazi regime and represented all of the organizations labeled criminal in the indictment itself.<sup>202</sup> With suspects numbering in the thousands, the majority of those charged or in custody by the Hague Tribunal are low-level figures, as many of the more culpable higher-level civilian and military leaders have either not been indicted, or if indicted, are not in custody. Former Prosecutor Richard Goldstone has justified the failure to focus on military and political leaders this way: "Our strategy includes the investigation of lower-level persons directly involved in carrying out the crimes in order to build effective cases against the military and civilian leaders who were party to the overall planning and organization of those crimes."<sup>203</sup> Yet, given its limited resources and the fact that the Hague Tribunal has only two courtrooms to try cases, this prosecution strategy has come under implicit criticism by the Inspector General of the United Nations. In a February

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*Center for International Programs*, located at <http://www.nesl.edu/center/warcrim1.html>.

<sup>201</sup> Gary J. Bass, "Courting Disaster, The U.N. Goes Soft on Bosnia. Again.," *The New Republic*, 6 September 1993, 12.

<sup>202</sup> Harris, "A Call for an International War Crimes Court," p. 245. See also Smith, *Reaching Judgment at Nuremberg*, 63-65, 68-71.

<sup>203</sup> Press Statement by the Prosecutor, Justice Richard Goldstone, in Conjunction with the Announcement of Indictments on July 25, 1995.

1997 report focusing on the Rwanda Tribunal, yet equally applicable to the Hague Tribunal, he concluded that the failure of the prosecutor to ensure that the limited resources of his office were redirected to pursue key figures in the genocide "is the single most significant failing. Unless that is corrected, the Tribunal will have been created to little effect; the Rwandans and those in the former Yugoslavia will be justified in suspecting that justice delayed is justice denied; and the United Nations will have failed in its promise to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them."<sup>204</sup>

Third, the Hague Tribunal suffers from a chronic lack of financial support. Unlike Nuremberg, where budget constraints and limited resources were not an issue, The Hague is forced to operate in an environment of fiscal scrutiny due to past criticisms of bloated staffs and financial mismanagement. Though funded by a General Assembly account, cost overruns of other U.N. actions have forced the General Assembly to rely on voluntary contributions. Although the United States has provided more support than other nations (totaling \$18 million in the first three years of operations), the lack of voluntary and in-kind contributions has prevented the Tribunal from carrying out little more than a fraction of its functions and responsibilities. These limitations are reflected in the lack of indictments issued and the small scale of the court's investigatory operations. Fortunately, there are indications this may be changing. In a recent U.N. press release<sup>205</sup> a request has been submitted for a sixty-six per cent increase over last

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<sup>204</sup> See "Bringing War Criminals to Justice: Obligations, Options, Recommendations," and "Report of the Secretary-General on the Activities of the Office of Internal Oversight Services," *U.N. Document A/51/789*, February 6, 1997, Annex, paragraph 59.

<sup>205</sup> Press Release GA/AB/3153, "Administrative and Budgetary Committee Concludes Discussion of Support Account for Peace-Keeping Financing," June 2, 1997.

year's budget of \$35.4 million.<sup>206</sup> Most of the increase would go towards funding temporary posts to hire additional prosecutors and the building of an additional court room and court facilities. Even if approved, it falls well short of the near limitless budgets and staffs afforded Nuremberg.

Finally, Bland contends that the Hague Tribunal confronts an enormous task in its quest to gather incriminating evidence for use at trial. Unlike Nuremberg, where the Allies had the benefit of lengthy documentation and records of Nazi atrocities,<sup>207</sup> the level of detailed records and physical evidence in the former Yugoslavia is scarce. To make matters worse, the Commission of Experts charged with providing evidence of violations has a staff that is dwarfed in comparison to the hundreds of lawyers and investigators that were available for the Nuremberg prosecution in 1945.<sup>208</sup> The ability to obtain evidence has been hampered by a lack of control over areas where offenses have been committed; blatant tampering by Serbs with files containing crucial information on atrocities committed during the conflict; and the gathering of evidence by non-governmental organizations, which do not always have the ability to marshal evidence for criminal proceedings.<sup>209</sup>

Despite significant advances in positive and natural law since the trials at Nuremberg, challenges still confront the accused, prosecutors and judges at The Hague. Those who are anxiously awaiting mass indictments and speedy convictions, despite the

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<sup>206</sup> U.N. Document A/C. 5/51/30.

<sup>207</sup> Whitney R. Harris, *Tyranny of Trial: The Evidence at Nuremberg* (Dallas: Southern Methodist University Press, 1954), 544-545.

<sup>208</sup> The Nuremberg staff numbered two thousand, with more than one hundred prosecutors and an army of one million soldiers to provide all the necessary support. See Meron, "The Case for War Crimes Trials in Yugoslavia," 125.

<sup>209</sup> Bland, "Parallels, Problems and Prospects," 15.

codifications of international law and precedents established since the IMT, need to temper their expectations.

### C. SUMMARY

Supporters of the Hague Tribunal maintain that the international community has made tremendous strides since the IMT. The shortcomings which critics often attribute to Nuremberg have since been remedied by numerous precedents and legal codifications. Much of that criticism concerned the unprecedented nature of the Nuremberg proceedings, the alleged lack of judicial impartiality, and the conviction of Nazi leaders for violating the novel legal doctrine of crimes against peace.<sup>210</sup> Unarguably, "the *ex post facto* application of Allied-formulated laws, the tenuous legal foundation for the Tribunal's existence and authority, and the presence of judges from nations that had just vanquished that of the defendants are all factors that have tended to diminish the validity of the precedents established by Nuremberg."<sup>211</sup> Supporters of the Hague Tribunal maintain that it will not suffer from the same lack of jurisdiction and substantive precedents that haunted Nuremberg.<sup>212</sup> The current tribunal draws upon several precedents.

First, Chapter VII of the U.N. Charter provides the Hague Tribunal a legal, rather than the Nuremberg's political, foundation. Though the resolutions that established the Hague Tribunal were ratified only by the U.N. Security Council, they have been adopted as universally accepted and lawful resolutions that, in accordance with Article 25 of the

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<sup>210</sup> Lippman, "Nuremberg: Forty-Five Years Later," 63.

<sup>211</sup> Bland, "Parallels, Problems and Prospects," 7.

<sup>212</sup> James Podgers, "Repeating Nuremberg," *ABA Journal*, (October 1993): 121.



U.N. Charter, must be recognized and implemented by all states. Considerable pains have been taken to present The Hague as a legitimate organ of the General Assembly and one not dominated by any one nation or coalition.<sup>213</sup> The 1945 London Agreement, on the other hand, though eventually recognized by nineteen other nations, had the political backing of only the four victors.

Second, international positive and natural law has been codified since Nuremberg. A sufficient legal basis and precedent to indict and prosecute Yugoslav war criminals exist in the numerous conventions, protocols, and international humanitarian law codifications adopted since Nuremberg. As the President of the Hague Tribunal, Antonio Cassese, stated, "for the first time, the community of states is rendering a justice which is not that of the victors...a justice animated not by a spirit of revenge, but by the determination to bring the criminals to book and prevent further crimes."<sup>214</sup>

These differences, coupled with the marked developments in international organizations, such as the U.N., have produced in the Hague Tribunal a judicial body unlike the Nuremberg IMT with respect to establishment, structure, and legal basis.<sup>215</sup> The Security Council, in establishing a legally valid and internationally recognized war crimes tribunal to prosecute violators of international humanitarian law in the former Yugoslavia, possesses an unprecedented opportunity to fulfill the United Nation's moral imperative to "promot[e] and encourag[e] respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."<sup>216</sup>

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<sup>213</sup> Chaney, "Pitfalls and Imperatives," 93.

<sup>214</sup> Statement of Antonio Cassese, President of the Tribunal, *U.N. Document IT/23*, January 23, 1994.

<sup>215</sup> Chaney, "Pitfalls and Imperatives," 65.

<sup>216</sup> U.N. Charter, Article 1.

The former Yugoslavia, unfortunately, is not the sole humanitarian tragedy of this era. The use of chemical weapons by Iraq against its Kurdish population is just as criminal, but has gone unpunished by national and international courts.<sup>217</sup> The fact that those guilty of these and other atrocities remain unaccountable for their actions during the U.N.-declared "Decade of International Law" (1990-2000)<sup>218</sup> suggests that the use of ad hoc tribunals to prosecute war criminals has questionable value as a deterrent. Those who criticize their effectiveness point to the fact that since 1919 there have been five international investigative commissions,<sup>219</sup> four ad hoc international criminal tribunals,<sup>220</sup> and three internationally mandated or authorized national prosecutions<sup>221</sup>. The fact that tribunals and commissions have been selectively initiated has convinced those who commit crimes against humanity that they can escape prosecution. However, a solution may be found in the establishment of a permanent international criminal court.

The establishment of a permanent judicial body that has international jurisdiction is an old initiative.<sup>222</sup> However, there is a widely held perception that the Hague Tribunal,

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<sup>217</sup> March 1988 is the first confirmed use by Saddam Hussein of chemical weapons against Kurds at Halabja, Iraq. An estimated 5000 people were killed.

<sup>218</sup> General Assembly Resolution 44/23, *U.N. Document A/44/49*, 1989.

<sup>219</sup> The 1919 Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties; The 1943 United Nations War Crimes Commission; The 1946 Far Eastern Commission; The 1992 Commission of Experts Established Pursuant to Security Council Resolution 780 to Investigate War Crimes and other Violations of International Humanitarian Law in the Former Yugoslavia; and The 1994 Independent Commission of Experts Established Pursuant to Security Council Resolution 935 to Investigate Grave Violations of International Humanitarian Law in the Territory of Rwanda.

<sup>220</sup> The 1945 International Military Tribunal to Prosecute the Major War Criminals of the European Theater; The 1946 International Military Tribunal to Prosecute the Major War Criminals of the Far East; The 1993 International Criminal Tribunal for the Former Yugoslavia; and The 1994 International Criminal Tribunal for Rwanda.

<sup>221</sup> 1921-1923 Prosecutions by the German Supreme Court Pursuant to Allied Requests Based on the Treaty of Versailles; 1946-1955 Prosecutions by the Four Major Allies in the European Theater Pursuant to Control Council Law No. 10; and the 1946-1951 Military Prosecutions by Allied Powers in the Far East Pursuant to Directives of the Far Eastern Commission.

<sup>222</sup> Though the establishment of tribunals for Rwanda and the former Yugoslavia have led to a renewed interest in a permanent international criminal court, the international community has contemplated the

depending on its success, in conjunction with the end of Cold War, may very well provide the crucial impetus for the establishment of a permanent international criminal court that will have cooperative jurisdiction over acts ranging from piracy and terrorism to genocide and war crimes.

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establishment of such a venue since the late 19<sup>th</sup> century. In 1895, in a proposal rejected by the Institute for International Law, the International Red Cross recommended the creation of a permanent international criminal court to deter violations of war. Most were unwilling to accept a world court because it was an affront to the concept of state sovereignty.



## V. BEYOND THE HAGUE

No peace can endure long without justice. For only justice can finally break the cycle of violence and retribution that fuels war and crimes against humanity.

William J. Clinton (1995)<sup>223</sup>

If some surrender of national sovereignty is involved to make it work, so be it. We have already waited too long to institutionalize Nuremberg.

Henry King (1996)<sup>224</sup>

There have been advances in international positive law since Nuremberg. However, it would be unrealistic to think that the tragedies brought about by wars and human rights abuses, which have plagued the twentieth century, will disappear with these codifications as we enter a new century. As a result, the need for a globally accepted system of justice to judge individuals accused of crimes against humanity will remain. If successful, such a permanent court could go a long way in deterring the next potential Karadzic or Mladic.<sup>225</sup>

### A. THE END OF AD HOC TRIBUNALS?

In spite of the limited successes enjoyed by the ad hoc tribunals for the former Yugoslavia and Rwanda, many states question the utility and legitimacy of applying ad-

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<sup>223</sup> Remarks by the President at the Opening of the Commemoration of 50 Years After Nuremberg: Human Rights and the Rule of Law, *White House transcript*, October 15, 1995.

<sup>224</sup> King, who prepared the cases against the head of the German Army and Air Force, speaking at the 50 reunion of Nuremberg on March 23, 1996, about the proposed international criminal court. See Mike Magan, "The Legacy of Nuremberg," *The National Law Journal* (April 8, 1996): A7.

<sup>225</sup> Framers have proposed that, though the court be a permanent body, it would sit only when requested to

hoc tribunals to future tragedies. There are several reasons why some members of the United Nations have indicated a reluctance to continue this ad hoc approach.

The first, sometimes referred to as “tribunal fatigue,” is that the process of reaching a U.N. Security Council consensus on the tribunal’s statue, electing judges, selecting prosecutors, and appropriating funds has turned out to be politically exhausting. Ad hoc tribunals take time to establish, during which evidence may be destroyed and additional lives lost. The ad hoc approach does not provide the international community with a standing mechanism that can promptly investigate and prosecute reported war crimes and other atrocities.

Second, many of the 183 countries who do not possess permanent membership and a veto in the Security Council, view the creation of ad hoc tribunals by the Council as inherently unfair because the permanent members, through the use of a veto, have the ability to shield themselves and their allies from the jurisdictions of such tribunals. These states contend that the ad hoc approach to the enforcement of international criminal law is therefore politicized.

Third, with regard to the rarity with which ad hoc tribunals have been convened by the international community, as well as the variability of their jurisdictional structures, there is no predictability in the ad hoc approach, and thus, no effective deterrent.

The final reason ad hoc tribunals are viewed by many as ineffective concerns judicial independence, which is the principal guarantee of the rule of law. As a safeguard of judicial impartiality, it helps ensure the fair adjudication of the rights and claims at stake in any given case – that is, the right to a fair trial. The incompatibility between

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hear a specific case in an effort to reduce costs.

temporarily constituted judicial bodies and judicial independence is widely acknowledged: simply put, courts that are impermanent are too vulnerable to political manipulation, including outright termination, to be truly independent.<sup>226</sup>

## B. FUTURE INTERNATIONAL JUSTICE

A permanent international criminal court, created by a multilateral treaty, is thus hailed by the majority of countries in the United Nations as a solution to the problems that plague the ad hoc approach. As a result, in December 1994 the General Assembly adopted a resolution providing for the creation of an intercessional committee, open to all member states, which met twice in 1995 to review a draft statute for an international criminal court (ICC),<sup>227</sup> completed in 1994 by the International Law Commission (ILC), and to consider arrangements for the convening of an international conference of plenipotentiaries to adopt the statute.<sup>228</sup> After years of multinational working groups, a diplomatic conference has been scheduled to meet in Rome in June 1998 for interested states to finalize and sign a multilateral treaty establishing the ICC.<sup>229</sup> The international criminal court will have jurisdiction over the three so-called core crimes – genocide, war crimes and crimes against humanity – and possibly jurisdiction over a number of so-called treaty crimes such as acts of terrorism, drug trafficking,<sup>230</sup> and aggression.<sup>231</sup> As

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<sup>226</sup> Bradley E. Berg, "The 1994 Draft Statue for an International Criminal Court: A Principle Appraisal of Jurisdictional Structure," *Case Western Reserve Journal of International Law* (spring 1996): 238-241.

<sup>227</sup> The 60-article ILC Draft Statue details the establishment of the court; its relationship to the United Nations; composition and administration; jurisdiction and applicable law; investigation and advancement of prosecution; trial; appeal and review; international cooperation and judicial assistance; and enforcement.

<sup>228</sup> General Assembly Resolution 49/53, U.N. GAOR, 49<sup>th</sup> Session, *U.N. Document A/49/53*, 1994. See also Scharf, "The Politics of Establishing an International Criminal Court," 170.

<sup>229</sup> General Assembly Resolution 51/207, U.N. GAOR, 51<sup>st</sup> Session, *U.N. Document A/51/207*, 1996.

<sup>230</sup> With respect to treaty-based crimes such as terrorism and drug trafficking, many states, including the U.S., claim the ICC would not be equipped to adequately adjudicate them. They point to the sensitive nature of the information involved in, for example, terrorism investigations, as well as their complexity and

with all international treaties, once the statute is adopted, it must be ratified by each government. Many states would like to see the treaty for the ICC come into force by 1999, on the occasion of the 100<sup>th</sup> anniversary of the First International Peace Conference.<sup>232</sup>

A key point still being argued is how such cases would be presented for acceptance by the ICC. Some states, notably those in Asia, want to be able to petition the court themselves. Others, especially those in Europe and Latin America, favor a system where a group of international prosecutors would have the authority to petition the court. The U.S. and China want wide latitude for the Security Council to commence actions.<sup>233</sup>

### C. PAST ATTEMPTS TO ESTABLISH THE ICC

The idea of a permanent international criminal court, though receiving a great deal of momentum from the establishment of tribunals for the former Yugoslavia and Rwanda, has been debated throughout the twentieth century, especially in the post-Nuremberg era. Nuremberg, in bringing forth the principle of individual responsibility, raised the hopes of many that it would set a lasting precedent with the establishment of a permanent international judicial body. As such, attempts immediately after World War II and throughout the Cold War produced at least six proposals for the establishment of a

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long duration. See Jelena Pejic "What is an International Criminal Court?" *Human Rights*, Volume 23:4 (fall 1996).

<sup>231</sup> Stoelting, David., "International Courts Flourish in the 1990s; Nations Cede Authority," *New York Law Journal* (August 4, 1997): 52. See also Christopher K. Hall, "Current Development: The First Two Sessions of the United Nations Preparatory Committee on the Establishment of an International Criminal Court," *American Journal of International Law* (January 1997). Crimes within the jurisdiction of the ICJ are listed in Article 20 of the ILC Draft Statute.

<sup>232</sup> It is expected that the ICC will be located in The Hague, the site of the International Court of Justice and the ad-hoc Hague and Rwanda Tribunals.

<sup>233</sup> All agree that the ICC would have automatic or "inherent" jurisdiction over genocide whenever a state party to the statute is also a party to the Genocide Convention.



permanent international criminal court, including the Sottile Proposal (1951), the United Nations Draft Statue (1953), the International Law Association Proposal (1982), the Bassiouni Proposal (1987), the Siracusa Proposal (1990), and the American Bar Association Proposal (1991).<sup>234</sup>

Despite tremendous advances, though questionable in an international legal sense, made by the rulings at Nuremberg, the reality of the Cold War environment prevented adoption of any proposal for the establishment of a permanent court. Though many countries believed that an international criminal court was desirable in theory, the failure of the world's major powers to support the idea doomed its creation.<sup>235</sup> Political and military confrontations between the East and West spilled over into the international legal arena, as numerous commissions of international jurists were unable to reach agreement on basic tenets, such as jurisdiction, an acceptable code of crimes, or a definition of what constitutes aggression.<sup>236</sup> Both the Soviet Union and the United States believed that their sovereignty would be affected by the establishment of such a court and were not prepared to accept such a submission during the height of the Cold War. Therefore the effort, which held so much promise immediately following Nuremberg, lapsed into desuetude for the next thirty-five years.

Though the Cold War severely hindered the codification process, progress has

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<sup>234</sup> Berg, "The 1994 Draft Statue for an International Criminal Court: A Principal Appraisal of Jurisdictional Structure," 222.

<sup>235</sup> France was the only permanent member of the Security Council willing to support the establishment of an international criminal court.

<sup>236</sup> Defining aggression proved to be difficult. The General Assembly appointed a Special Committee on the Question of Defining Aggression (1952-1954), then a second Committee (1954-1957), and then a third (1959-1967), and lastly a fourth Special Committee (1967-1974). These four committees submitted various reports which were debated and discussed at length by the General Assembly. The last of the four finally completed its task in 1974 and the General Assembly adopted the definition of aggression by a

occurred since 1989. With improving relations between the Soviet Union and the United States, work on an international criminal court resumed in 1990 when the General Assembly requested the ILC to address the "question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed crimes which may be covered under...the Draft Code of Crimes."<sup>237</sup> The ILC provisionally adopted a Draft Code of Crimes in 1991 and 1992 and created a working group on an international criminal court. The ILC working group produced an extensive report outlining the general basis upon which, in its opinion, the establishment of such a court could proceed. The proposals represented a compromise between those who would have gone much further and those who felt that nothing should be done at all. With one exception,<sup>238</sup> the proposals, which were largely based on the work of the 1951 Sottile Proposal and the 1953 United Nations Draft Statute, were adopted in the 1994 ILC Draft Statute.<sup>239</sup>

Though many in the international community expects that this court will be operational with the dawn of a new millennium, the efforts currently being conducted by the U.N. working groups framing its establishment are monumental, as they must ensure that widely-accepted legal principles form the bedrock of establishment. The shortcomings experienced by ad hoc tribunals or in previous attempts to establish a permanent international judicial body must be avoided. To be recognized as legitimate

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consensus resolution. See General Assembly Resolution 3314, U.N. GAOR, 29<sup>th</sup> Session, *U.N. Document A/9631*, 1974.

<sup>237</sup> The resolution was introduced by a coalition of sixteen Caribbean and Latin American nations who were concerned with the problem of extraditing and prosecuting international narco-terrorists. General Assembly Resolution 44/39, U.N. GAOR, 44<sup>th</sup> Session, *U.N. Document A/44/39*, 1989.

<sup>238</sup> Article 20 of the 1994 Draft contains a more expansive notion of the Court's jurisdiction than was originally proposed.

the United Nations has ensured that several significant principles were integrated in the 1994 Draft Statute.<sup>240</sup>

First, individual criminal responsibility, which was greatly clarified and strengthened as a legal principle in the Charter and judgment of the IMT at Nuremberg, must remain the preeminent principle of international criminal law. To be effective, an international criminal court must focus on deterring individuals from committing crimes against humanity. Though not specifically spelled out,<sup>241</sup> the Draft Statute nonetheless reaffirms the judgments reached at Nuremberg — that crimes against international law are committed by men, not abstract entities, and that only by punishing individuals who commit such crimes can the provisions of international law be enforced.<sup>242</sup> Though the Draft Statute imposes criminal responsibility for individuals, it does not dismiss the responsibilities of states. International forums other than an international criminal court, notably the Security Council or International Court of Justice, are more suited to addressing the wrongful acts of states.<sup>243</sup> Second, the Draft Statute recognizes the concept of non-retroactivity. A person cannot be charged with an offense unless that offense existed in law at the time of the act.<sup>244</sup> Finally, the decision to use a multilateral treaty, instead of a Security Council Resolution, to establish the ICC, ensures that states

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<sup>239</sup> Wexler, "The Proposed International Criminal Court: An Appraisal," 684-685.

<sup>240</sup> Berg, "The 1994 Draft Statute for an International Criminal Court: A Principle Appraisal of Jurisdictional Structure," 230-260.

<sup>241</sup> Restricting jurisdiction to natural persons is an assumption that runs throughout the Draft Statute. Specific mention of individual criminal responsibility can be found in *U.N. Working Group Document A/AC.249/1997/WG.2/CRP.2*, February 13, 1997.

<sup>242</sup> IMT Judgment, 466-467.

<sup>243</sup> Attaching criminal responsibility to non-individual actors would raise numerous practical problems, particularly with respect to the likelihood of voluntary state accession and eventual enforcement. More importantly, the principles and objectives that underpin international criminal law flow directly from legal rights held by individuals, not states or organizations.

<sup>244</sup> *ILC Draft Statute*, Part 5, Article 39.

besides the major powers have input into the structures and jurisdiction of the court.

As is evident from these principles, the United Nations has taken the necessary steps to ensure that a majority of states should ratify the treaty that establishes the ICC. Despite growing support for the establishment of an international criminal court, some countries remain deeply opposed to its establishment, or at least the way it has been currently proposed. These states argue that if the court is unsuccessful, its ineffectiveness will undermine the international legal order its creation seeks to bolster. Others contend that the court could make peace impossible. When hostilities are over and both sides are ready to shake hands, it is possible that lawyers would begin a war of accusation, counter-accusation, and recrimination, thereby rendering any chance at peace difficult.<sup>245</sup>

However, the greatest challenge to the court's establishment comes from members of the Security Council, notably the United States and China. Both countries insist that the Security Council should be the arbiter of which cases should go to the international court, a view at odds with that of nearly all other countries. These powers believe that Washington and Beijing would use their influence to choose which cases they would allow the court to hear, thus limiting the independence of the international court prosecutor. China has increasingly expressed concern about the creation of the ICC, perhaps out of fear that its own human rights abuses might be subjected to jurisdiction. Therefore, they wish to reserve the right to veto any actions taken against their internal conduct. As for the United States, its opposition to any process outside the Security Council's initiation of criminal proceedings arises from a fear that U.S. military personnel, who are called upon to rescue hostages, protect Americans overseas, conduct

peacekeeping operations, and engage in anti-terrorist activities will be subjected by disgruntled states to prosecution by the ICC. "It would not surprise me at all if Libya, as treaty partner to this statute, will file regular, perhaps weekly complaints against officials not only in the United States, but of other countries for strictly political reasons."<sup>246</sup> As a result, ratification by the U.S. Senate may be difficult.<sup>247</sup>

Though these hurdles are formidable, if there is the necessary political will to establish a court, they are far from insurmountable. In light of the debate over triggering mechanisms, the U.S. position appears to be evolving. President Clinton and David Scheffer have proposed that the Security Council be given authority to refer an entire situation to the court — the situation in the former Yugoslavia, for example — after which the international prosecutors of the ICC would have wide latitude to decide which specific cases would be tried.

#### D. CONCLUSION

President Clinton declared that "nations all around the world who value freedom and tolerance [should] establish a permanent international court to prosecute, with support of the...Security Council, serious violations of international law." A permanent international court "would be the ultimate tribute to the people who did such important work at Nuremberg."<sup>248</sup> Though the establishment of a permanent international criminal court to judge crimes against humanity has been a goal that has eluded the United Nations

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<sup>245</sup> Wexler, "The Proposed International Criminal Court: An Appraisal," 666, 672.

<sup>246</sup> David Scheffer, ambassador-at-large for War Crimes Issues, quoted in "Global Justice Edges Closer: Creation of International Criminal Court Under Negotiation," *ABA Journal* (November 1997).

<sup>247</sup> "This...is the most politically charged issue....[I]t is conceivable" that Washington would not sign a treaty that failed to keep intact its veto power. Scheffer, quoted in "U.S. May Nix Plan for U.N. Tribunal; Wants to be able Protect Citizens," *The Washington Times*, 22 October 1997, A1.

since its establishment, the end of the Cold War has allowed attention to be focused on atrocities that in previous times would have been ignored. "Legal accountability, if consistently applied, would surely bring about much of the good on an international scale that it does domestically, in terms of deterrence, rehabilitation of the victims of crime, retribution for the criminal act, and upholding of the principles of justice and law."<sup>249</sup> The creation of a permanent international criminal court might go a long way toward ensuring these principles.

The punishment of those convicted at Nuremberg legitimized the process of international criminalization of certain conduct and raised expectations about a new era of justice and the rule of law in international relations.<sup>250</sup> Many nations in the post-World War II community made a significant effort to codify the precedents established in international law beyond the Nuremberg Principles by attempting to create a world criminal court. The realities of East-West confrontations dictated otherwise and the lack of political consensus relegated the most obvious organ of international justice, the United Nations, fairly impotent. "As a result, since the end of World War II the international legal community lurched from crisis to crisis in an attempt to develop and adjudicate international criminal law."<sup>251</sup>

Nearly fifty years later the stage was set again in Europe to judge those accused of war crimes and genocidal practices. Recognizing the shortcomings that occurred at Nuremberg, the framers of the Hague Tribunal took the unprecedented steps of ensuring

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<sup>248</sup> David J. Scheffer, "International Judicial Intervention," *Foreign Policy*, (spring 1997): 50.

<sup>249</sup> Wexler, "The Proposed International Criminal Court: An Appraisal," 665-666.

<sup>250</sup> Timothy McCormack, "Conceptualizing Violence: Present and Future Developments in International Law," *Albany Law Review*, Volume 60 (1997): 729.

<sup>251</sup> Berg, "The 1994 Draft Statue for an International Criminal Court: A Principle Appraisal of

that prosecution of war criminals in the former Yugoslavia would be based entirely on established internationally recognized principles. Because of this the creation of the Hague Tribunal was a relatively long process that did not have the full support of all states in the United Nations.

The history and record of international criminal investigative and adjudication attempts, from the Treaty of Versailles to the Nuremberg IMT to the Hague Tribunal, clearly demonstrate the need to establish a permanent international judicial body. "If the lessons of the past are to instruct the course of the future, then the creation of a permanent system of international criminal justice with a continuous institutional memory is imperative. Such a system must be independent, fair, and effective in order to avoid past pitfalls. Above all, it must be free from political manipulation, because compromise is the art of politics, not of justice."<sup>252</sup>

Despite the strides the Hague Tribunal has made, in the absence of such a court, not only have many atrocities gone unpunished, but almost every ad hoc tribunal and international investigation created has suffered from some degree of politicization or the influence of a changed geopolitical situation.<sup>253</sup> A permanent court with jurisdiction over serious violations of international humanitarian law is needed and should be created. The United States, especially the military, could benefit from its establishment as enforcing international law in a fair and consistent manner would not only deter future war crimes, genocide and crimes against humanity, but would serve as a deterrent that might reduce the need for future U.S. interventions, which have proven costly in terms of military lives

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Jurisdictional Structure," 230.

<sup>252</sup> Ibid., 12-13.

and dollars, as illustrated by recent situations in Somalia and Bosnia.

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<sup>253</sup> Bassiouni, "From Versailles to Rwanda," 11.



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